United States General Accounting Office

GAO

Report to the Chairman, Subcommittee on Government Information, Justice, and Agriculture, Committee on Government Operations, House of Representatives

September 1989

JUSTICE AUTOMATION

Security Risk Analyses and Plans for Project EAGLE Not Yet Prepared

FG1INIGA-01

GAO/IMTEC-89-65

GAO

United States
General Accounting Office
Washington, D.C. 20548

Information Management and
Technology Division

B-233809

September 19, 1989

The Honorable Bob Wise
Chairman, Subcommittee on Government Information,
Justice, and Agriculture
Committee on Government Operations
House of Representatives

Dear Mr. Chairman:

In a July 28, 1988, request and in subsequent discussions with your office, we were asked to review various aspects of EAGLE[1] —a Department of Justice project intended to supply office automation systems to its lawyers, managers, secretaries, and other employees. The current cost of this project, for which a contract was awarded in June 1989, is $76 million.[2] On December 8, 1988, we briefed the former Chairman's office on Justice's approach to satisfy its office automation needs and whether Project EAGLE was being acquired in accordance with federal procurement policies and procedures.

While this briefing satisfied the former Chairman's request, we were asked to provide additional information on Justice's actions to ensure that information maintained in the systems acquired under Project EAGLE is properly safeguarded. Accordingly, this report provides requested information on the Department of Justice's efforts to develop security plans and conduct risk analyses for the Project EAGLE systems, as required by federal law and regulations.

Although sensitive information[3] will be contained in the Project EAGLE systems, Justice has not developed security plans or conducted risk analyses for these systems. The Computer Security Act of 1987 (PL 100-235) and other federal regulations and guidelines require that these actions be taken to ensure that the information will be protected against unauthorized access or disclosure.

[1] EAGLE stands for Enhanced Automation for the Government Legal Environment.

[2] According to Justice officials, the actual cost of the EAGLE systems may vary depending upon the extent to which Justice exercises upgrade options included in the contract.

[3] According to the definition of terms stated in the Computer Security Act of 1987 (15 U.S.C.A. 278g-3(d)(4)(West Supp. 1989)), sensitive information is any information which if lost, misused, or accessed or modified without authorization, could adversely affect the national interest or conduct of federal programs, or the privacy to which individuals are entitled under the Privacy Act (5 U.S.C. 552(a)).

During the course of our review, Justice officials stated that they intended to perform risk analyses and develop security plans after the Project EAGLE systems were installed and operating. In later discussions with these officials, we pointed out that such actions should take place prior to the systems' installation to ensure that proper safeguards are incorporated in the systems. Justice officials subsequently agreed to revise their approach and began taking steps to prepare the risk analyses and security plans prior to the installation and operation of the EAGLE systems. These steps, if properly completed prior to installing the systems in each site, should help ensure the security of these systems. Accordingly, we are making no recommendations at this time.

In performing this review, we examined Justice's policies for securing automated information resources, related security requirements, and relevant documents pertaining to the Project EAGLE procurement. We also interviewed the project manager and other Justice officials having knowledge of Project EAGLE to determine their strategy for assessing the project's security risks and identifying appropriate safeguards. Our work was performed in accordance with generally accepted government auditing standards from August 1988 to June 1989. Additional information on our objectives, scope, and methodology is contained in appendix I.

kground

Under the direction of the Attorney General, Justice represents the government in federal legal matters that include performing investigations, conducting grand jury proceedings, and preparing and trying cases and appeals. Legal and prosecutorial functions are conducted by Justice's litigating organizations, which include 94 U.S. Attorney Offices and six divisions—Antitrust, Civil, Civil Rights, Criminal, Lands and Natural Resources, and Tax.

In response to increasingly large and complex caseloads, Justice's litigating organizations have come to rely on various incompatible office automation systems—ranging from advanced, multifunction systems in some organizations to less sophisticated, stand-alone, single-function workstations in others. As part of a study completed in 1986,[4] Justice researched alternatives to achieve a more uniform office automation capability and increase the efficiency and productivity of its litigating organizations. Justice concluded that it would benefit most from an

[4]U.S. Department of Justice, Uniform Office Automation and Case Management Project - Phase I Report, Mar. 26, 1986.

During the course of our review, Justice officials stated that they intended to perform risk analyses and develop security plans after the Project EAGLE systems were installed and operating. In later discussions with these officials, we pointed out that such actions should take place prior to the systems' installation to ensure that proper safeguards are incorporated in the systems. Justice officials subsequently agreed to revise their approach and began taking steps to prepare the risk analyses and security plans prior to the installation and operation of the EAGLE systems. These steps, if properly completed prior to installing the systems in each site, should help ensure the security of these systems. Accordingly, we are making no recommendations at this time.

In performing this review, we examined Justice's policies for securing automated information resources, related security requirements, and relevant documents pertaining to the Project EAGLE procurement. We also interviewed the project manager and other Justice officials having knowledge of Project EAGLE to determine their strategy for assessing the project's security risks and identifying appropriate safeguards. Our work was performed in accordance with generally accepted government auditing standards from August 1988 to June 1989. Additional information on our objectives, scope, and methodology is contained in appendix I.

ground

Under the direction of the Attorney General, Justice represents the government in federal legal matters that include performing investigations, conducting grand jury proceedings, and preparing and trying cases and appeals. Legal and prosecutorial functions are conducted by Justice's litigating organizations, which include 94 U.S. Attorney Offices and six divisions—Antitrust, Civil, Civil Rights, Criminal, Lands and Natural Resources, and Tax.

In response to increasingly large and complex caseloads, Justice's litigating organizations have come to rely on various incompatible office automation systems—ranging from advanced, multifunction systems in some organizations to less sophisticated, stand-alone, single-function workstations in others. As part of a study completed in 1986,[4] Justice researched alternatives to achieve a more uniform office automation capability and increase the efficiency and productivity of its litigating organizations. Justice concluded that it would benefit most from an

[4] U.S. Department of Justice, Uniform Office Automation and Case Management Project - Phase I Report, Mar. 26, 1986.

office automation system that would provide interoperability (that is, the ability to communicate through an interface) among the incompatible systems in the litigating organizations in the short-term, and uniform hardware and software among these and other departmental systems in the long-term.

To accomplish these objectives, Justice initiated in May 1986 design and development activities, which ultimately led to the award of an 8-year, $76 million contract for Project EAGLE. Under the contract, which was awarded in June 1989, Justice plans to acquire hardware, commercial off-the-shelf software, and essential support services (such as maintenance and training) to meet its office automation and information management requirements.

The Project EAGLE contract is expected to provide a network of integrated systems, linking 12,000 workstations in 200 sites nationwide. The project is designed to enable users to perform on one workstation a variety of functions that currently must be performed on multiple, standalone, single-function terminals. These functions include word processing, data base management, document storage and retrieval, electronic mail, and calendar management. In addition, the EAGLE systems should provide all users with desktop access to a variety of other systems and services, such as existing case management and litigation support systems, on-line legal research services, and Justice Data Center operations.

Justice initially plans to install EAGLE systems in three of its litigating organizations—the Tax Division, Criminal Division, and U.S. Attorney Offices. Also, to achieve departmentwide, uniform office automation, other litigating and nonlitigating organizations will be required to either purchase EAGLE hardware and software or acquire systems that are compatible with Project EAGLE.

Justice had planned to begin installing the EAGLE workstations within 60 days after the contract was awarded, and to complete the installations in about 3 years. However, these plans were put on hold in late June 1989 after three vendors that unsuccessfully bid on the contract protested the award. According to the EAGLE project manager, these protests have since been resolved and Justice now plans to begin installing the workstations in late October 1989.

Because the EAGLE systems will contain sensitive information—including the names of defendants, witnesses, informants, and undercover law enforcement officials—this project is subject to the requirements of the

Computer Security Act of 1987 and other applicable federal guidelines and regulations. The Computer Security Act of 1987 requires federal agencies to identify, and develop security plans for, operational and developmental computer systems that contain sensitive information.[5] Office of Management and Budget (OMB) guidelines stipulate that each plan must include a basic description of the purpose, environment, and sensitivity of the system; the system's security and privacy requirements; and the agency's plan for meeting those requirements.[6] The Federal Information Resources Management Regulation (41 C.F.R. part 201-7) and OMB policies[7] further require agencies to conduct a security risk analysis to assess the threats to which the system will be exposed and the vulnerabilities of the system before its operational use.

Security Plans and Risk Analyses Not Prepared for Project EAGLE

Justice has not developed security plans or performed security risk analyses for Project EAGLE to ensure that sensitive information contained in the systems will be adequately protected. The EAGLE project manager and other officials in the Justice Management Division recognized the requirement for such actions, but prior to discussing these issues with us had not intended to conduct risk analyses or prepare security plans until after the systems were installed and operating.

The officials cited two reasons for this position. First, they believed existing physical security safeguards (such as building and computer room access controls) were adequate for the time being and that any refinements could be made after the systems' installation. Second, they contended that system security needs could not be determined because the systems' architecture, including hardware and software requirements, was unknown prior to selecting the winning vendor. The Request for Proposals specified the functional requirements and performance criteria for the systems but allowed vendors to propose the architecture, equipment, and software.

In discussions with these officials, we expressed concerns with the reasons they cited for not conducting the risk analyses and developing the security plans prior to the systems' installation. With regard to their position on physical security, we pointed out that such safeguards alone

[5] 40 U.S.C.A. 759nt. (West Supp. 1989).

[6] Office of Management and Budget Bulletin No. 88-16, Guidance for Preparation and Submission of Security Plans for Federal Computer Systems Containing Sensitive Information, July 6, 1988.

[7] Office of Management and Budget Circular No. A-130, Management of Federal Information Resources, Dec. 12, 1985.

are not the only controls that are necessary to ensure adequate protection of the data processed and maintained within the systems. Typically, systems such as those included in Project EAGLE require operational and technical controls, as well as physical controls. Operational controls include, for example, the formulation of contingency plans for backup in the event of a system failure. Technical controls include authenticating the identity of remote users, and encryption of data during transmission.

Regarding the officials' contention that the systems' architecture was unknown, we noted that with the award of the Project EAGLE contract in June 1989, the architecture, including the hardware and software requirements, should now be available. The contract specified the types and quantities of hardware and software that will be required to meet Justice's office automation needs.

In light of the above, we see no compelling reason for Justice to delay conducting risk analyses and preparing security plans until after the Project EAGLE systems are installed. As we reported in May 1988, the most efficient and effective means to ensure that a system contains appropriate security controls is to address security issues when designing the system, not after it is installed.[8] Given that the contract has been awarded and the systems' architecture has been determined, Justice's emphasis should now be on performing these tasks as early as possible. To ensure that proper safeguards are incorporated in these systems in accordance with applicable federal requirements, the analyses and plans should be completed prior to installation and use.

After discussing our concerns with Justice officials, they agreed to perform risk analyses and prepare security plans before installing and operating the EAGLE systems. The Director of the Justice Management Division's Systems Policy Staff agreed that performing risk analyses prior to installing equipment will better ensure that security threats are identified and needed safeguards are implemented. The EAGLE project manager stated that Justice has the opportunity to perform the risk analyses on a site-by-site basis prior to installing the hardware and software being procured under this contract. He added that Justice has begun developing guidelines for conducting risk analyses and preparing security plans for those sites that will acquire the EAGLE systems. The guidelines are due to be completed in early October 1989. We believe

[8] Information Systems: Agencies Overlook Security Controls During Development (GAO/IMTEC-88-11) May 31, 1988.

these actions, if properly completed prior to installing the systems in each site, should help ensure the security of these systems. Accordingly, we are making no recommendations at this time.

As requested by your office, we did not obtain formal agency comments on this report. However, we discussed the information in the report with responsible Justice officials and have included their comments where appropriate. As agreed with your office, unless you publicly announce the report's contents earlier, we plan no further distribution until 30 days from the date of the report. At that time, we will send copies to the Attorney General of the United States and other interested parties. This report was prepared under the direction of Howard G. Rhile, Director, General Government Information Systems, who may be reached at (202) 275-3455. Other major contributors are listed in appendix II.

Sincerely yours,

Howard G. Rhile
for
Ralph V. Carlone
Assistant Comptroller General

GAO

United States
General Accounting Office
Washington, D.C. 20548

Information Management and
Technology Division

B-238836

November 6, 1990

The Honorable Jack Brooks
Chairman, Committee on the
Judiciary
House of Representatives

Dear Mr. Chairman:

In response to your January 26, 1990, request, this report discusses the Department of Justice's automated data processing (ADP) management and operations. Specifically, you asked us if Justice has adequately responded to our previous recommendations on ADP management and case management. You also asked for an assessment of Justice's technical and management capabilities in the ADP area including whether (1) Justice's central ADP management office has sufficient authority and resources to fulfill its responsibilities under two public laws, P.L. 89-306 and P.L. 96-511;[1] (2) Justice's central information resources management (IRM) office is structured in accordance with P.L. 96-511; and (3) Justice has sufficient resources to properly conduct large-scale ADP and telecommunications acquisitions. Additional information on our objectives, scope, and methodology is contained in appendix I.

Results in Brief

Justice has not adequately responded to our past recommendation to develop uniform, accurate, and complete case management information. Of broader concern, however, are management problems that can affect the overall management of Justice's information technology resources. In this regard, Justice has not adequately responded to our past recommendation to develop an IRM plan. Although Justice's central IRM office is structured in accordance with the Paperwork Reduction Act, the senior IRM official does not have clear authority to require component organizations to implement Departmental IRM decisions. Moreover, Justice believes it has neither sufficient staff to conduct large-scale ADP acquisitions nor the overall technical and managerial capabilities to ensure that it is spending its IRM funds in the most efficient and effective manner. Justice's inability to develop a case management system and an IRM plan, the lack of clearly defined authority of the senior IRM official to carry out his responsibilities, and the questionable level of technical and

[1] P.L. 89-306 is commonly referred to as the Brooks Act, and P.L. 96-511 as the Paperwork Reduction Act of 1980.

GAO 1990

managerial resources raise serious doubts as to Justice's ability to effectively manage its information technology resources.

Justice must take decisive steps to strengthen the management of its information technology resources. This report contains recommendations to the Attorney General to ensure that (1) our past recommendations are successfully addressed, (2) the senior IRM official has clear authority to implement Justice-wide information resources management decisions, and (3) Justice evaluates its central IRM office resource needs regarding technical and management capabilities, ADP contract management, and oversight, and augment them if they are inadequate.

Background

Justice has spent approximately $2.5 billion for information technology since fiscal year 1985. For fiscal year 1990, Justice's information technology budget is almost $579 million. Justice has estimated obligations of over $621 million for fiscal year 1991 for ADP and telecommunications technology. This amount represents approximately 10 percent of its total fiscal year 1991 budget request.

The Assistant Attorney General for Administration is in charge of the Justice Management Division, and is Justice's designated senior IRM official. The management division is assigned the responsibility of developing and administering IRM policy. These responsibilities include annually reviewing plans submitted by Justice organizations in conjunction with Justice's budget process, and overseeing the use and performance of information systems in accordance with Justice objectives, plans, policies, and procedures. The management division also reviews and approves the acquisition of ADP systems.

Justice Has Not Adequately Responded to Past GAO Recommendations

Since 1979 we have issued a number of reports addressing Justice's ADP management and operations. Two of these reports contained recommendations to the Attorney General to (1) improve Justice's ability to provide complete and reliable litigative caseload information, and (2) develop and implement an IRM plan. Justice has not fully responded to these recommendations. Therefore, most of the problems which prompted these recommendations continue today.

Justice's Litigative Caseload Information Still Unreliable and Incomplete

After a number of false starts and over a decade of effort, Justice still does not have a system that can accurately provide the total number of cases being litigated and the total number of staff in the litigating organizations working on them.[2] Efforts to develop such a system have been unsuccessful because (1) each litigating organization was allowed to develop a separate system to satisfy its own management needs, and (2) data submissions from the litigating organizations that fed the departmental system were incomplete and unreliable.

Since 1977, Justice has attempted to implement a departmentwide litigative case management system that would provide the Congress and the Office of Management and Budget (OMB) with summary information on its litigative caseload. The system was also to provide top Justice executives with work load information to make resource allocation and budgetary decisions. In 1979, we pointed out that the Congress and OMB had severe difficulties evaluating Justice's requests for additional resources because Justice lacked information on litigative caseloads.[3] We also reported that as a result, the Congress was requiring Justice to develop a comprehensive plan for managing its litigative caseloads. In response to the Congress, Justice developed a plan in April 1980 to implement a case management system. This system became operational in 1981.

In 1983, we reported that this system did not meet the information needs of either Justice or the Congress because it contained limited information on only a portion of Justice's overall work load, and that information was neither complete nor accurate.[4] Therefore, we recommended that the Attorney General develop a rigorous data management program to achieve uniform, accurate, and complete case management information. In response to our 1983 report, Justice assembled a group to develop a prototype, departmentwide case management system. This prototype was intended to extract common, case-related data from the case management systems of various divisions within Justice. By 1986 Justice had developed a prototype and was considering whether to implement it departmentwide.

[2] Justice's litigating organizations include six divisions—Antitrust, Civil, Civil Rights, Criminal, Lands and Natural Resources, Tax, and the Executive Office for U.S. Attorneys.

[3] Department of Justice Making Efforts to Improve Litigative Management Information Systems (GAO/GGD-79-80, Sept. 4, 1979).

[4] Department of Justice Case Management Information System Does Not Meet Departmental or Congressional Needs (GAO/GGD-83-50, Mar. 25, 1983).

Although our 1983 report pointed out that Justice needed to address fundamental data-integrity problems with its components' case management systems, Justice, without doing so, adopted the prototype as a departmentwide system. It became operational in 1986. Now, according to the senior IRM official, no one in Justice uses the system because of continuing data-integrity problems. According to the senior official, the main problem with the current system is the lack of a uniform case numbering system among the litigating divisions and U.S. Attorneys Offices. This problem results in multiple counting of cases, which are shared or transferred among the litigating divisions and U.S. Attorneys Offices. As a result, the departmentwide case management system cannot provide Justice, the Congress, or OMB with accurate caseload information.

In June 1989, Justice convened a new group to develop a uniform case numbering system and to discuss the possibility of having a standard case management system for all litigating organizations. However, the group met only once in 1989, and neither objective was fulfilled. The group's chairperson, who is also the project manager for the departmental case management system, stated that the senior IRM official could not dictate mission-related policy to the litigating organizations, and therefore could not dictate a uniform case numbering system. The same Justice official told us that to resolve the problems of case management, the senior IRM official would need the support of the Attorney General.

On May 21, 1990, we brought the lack of progress in developing a departmentwide case management system to the attention of Justice's senior IRM official. As a result, the senior IRM official wrote to the Attorney General on June 14, 1990, pointing out that Justice still does not have a system capable of providing accurate, aggregate caseload information. To solve this problem, the senior IRM official recommended to the Attorney General that Justice (1) conduct a consolidated requirements analysis of its case management information needs, and (2) explore the feasibility of developing a single case management system for all of its litigating organizations. The senior IRM official pointed out that these solutions will require cooperation from all of the litigating organizations and, therefore, asked the Attorney General for his support. The senior IRM official stated that he believes this effort will enable Justice to finally accomplish its goal of developing and implementing a single comprehensive case management system. On July 11, 1990, the Attorney General approved the senior IRM official's recommendations. On August 24, 1990, Justice entered into an agreement with the General Service Administration's Federal Systems Integration and Management Center to perform a consolidated requirements analysis, and is exploring

the feasibility of developing a single case management system by meeting with representatives of the litigating divisions.

IRM Plan Still Needed

In a 1986 report, we recommended that the Attorney General develop a plan for managing Justice's information resources.[5] In our view, without such a plan Justice could not adequately assess whether the ADP and telecommunications initiatives of its components helped them achieve departmental objectives. In response to our 1986 report, Justice developed a strategic, automated information systems plan. Justice first completed this plan in September 1986, and it was signed by the Attorney General in January 1987. Justice updated the plan in 1989.

Although the plan identifies information technology issues that cut across Justice, the plan is not clear on how Justice will use its information resources to accomplish its mission. As a result, it does not fully address how Justice will use information resources to accomplish departmental goals and objectives, as we recommended in 1986.

OMB Circular A-130 requires that agencies establish a planning process that meets program and mission needs. In addition, Justice's own methodology recommends that components identify their missions in their strategic plans, since all subsequent planning for Justice is built on components' missions.

Justice expects to develop an IRM plan, by July 1991, which will replace its current strategic plan.

Central IRM Office Structured in Accordance With the Paperwork Reduction Act

The Paperwork Reduction Act requires senior IRM officials to report directly to the agency head. The senior IRM official at Justice, however, reports to the Attorney General through the Deputy Attorney General rather than directly to the Attorney General. Although we are not aware of a specific delegation of this responsibility from the Attorney General to the Deputy Attorney General, by statute, the Attorney General has broad authority to delegate his functions to any other Justice official.[6] Furthermore, under federal regulations the Deputy Attorney General is authorized to exercise the Attorney General's responsibilities unless such responsibilities are required by law to be exercised personally by

[5] Justice Department: Improved Management Processes Would Enhance Justice's Operations (GAO/GGD-86-12, Mar. 14, 1986).

[6] 28 U.S.C. § 510.

the Attorney General.[7] Since the Paperwork Reduction Act does not require the Attorney General to personally receive reports from the senior IRM official, we think this responsibility can properly be performed by the Deputy Attorney General. Therefore, in our view, Justice's central IRM office is structured in accordance with the Paperwork Reduction Act.

Senior IRM Official Does Not Have Clear Authority

Under the Paperwork Reduction Act, federal agencies are assigned various information management responsibilities. These responsibilities include implementing applicable governmentwide and agency information policies, principles, standards, and guidelines. By departmental order, these functions have been assigned to the Justice Department's senior IRM official, the Assistant Attorney General for Administration.[8]

Under federal regulations, Justice's senior IRM official also has broad responsibilities that include IRM functions such as (1) formulating department policies, standards, and procedures for information systems; and (2) providing the final review and approval of systems, procedures, and standards for the use of data elements and codes.[9]

Although the senior IRM official has been given these broad responsibilities, neither Justice's departmental orders nor regulations give the senior official clear authority to direct component organizations to implement departmental IRM decisions. In this regard, we recommended in our 1986 report that the senior IRM official should clearly possess the authority to direct component actions to ensure successful departmentwide planning and implementation.[10] In response to this report, Justice said that the senior IRM official has tacit and regulatory authority to accomplish this task. Notwithstanding Justice's position on our 1986 recommendation, we still believe that Justice needs to clarify the senior IRM official's authority in implementing departmental IRM decisions.

This lack of clear authority may have impeded the senior IRM official from fully carrying out his assigned responsibilities. In our judgement clear authority is important because of the varying degrees of independence of Justice's component organizations. For example, while we are

[7]28 C.F.R. § 0.15.

[8]Department of Justice Order 2880.1, "Information Resources Management Program," June 26, 1987.

[9]28 C.F.R. § 0.75.

[10]GAO/GGD-86-12, Mar. 14, 1986.

not certain that this lack of clear authority alone prevented the senior IRM official from developing and implementing a uniform case numbering system as discussed earlier in this report, we noted that he asked the Attorney General for "his assistance" in obtaining "cooperation" among all the litigating components in developing such a system. Also, as previously discussed, the manager of this project expressed concern over the authority of the senior IRM official to require the use of a uniform case numbering system.

Justice Believes Its IRM Resources, and Technical and Management Capabilities Are Limited

Justice believes it has neither sufficient staff to conduct large-scale ADP acquisitions nor the overall technical and managerial capabilities to ensure that it is spending its IRM funds in the most efficient and effective manner. As a result, Justice claims it cannot adequately monitor its ADP contracts and properly conduct its oversight responsibilities.

Justice Says Its Resources to Monitor Contracts Are Limited

Justice says it has limited resources at the department and component level to administer its growing ADP budget. From 1991 through 1995, Justice plans to spend about $2.7 billion on 83 initiatives involving ADP hardware, software, and related services (see app. II). The senior IRM official has expressed concern that Justice may face problems managing its initiatives because of its lack of staff. In the Justice Management Division's tactical plan for 1989-1991, for example, the senior IRM official noted that there is a limited number of Justice Management Division staff with the technical and project managerial talent to conduct large systems design, acquisition, and implementation for five projects with total cost estimates exceeding $29 million over that 3-year period.

Similarly, a report by the Justice Management Division's Systems Policy Staff issued in April 1989, identified an increased reliance on contractors by Justice components to meet ADP operational and mission requirements.[11] The report questioned whether Justice has adequate personnel to manage information technology contracts so they serve Justice's best

[11] Trends in Information Technology Expenditures for In-House Personnel and Commercial Services (1982-1988), Apr. 11, 1989.

interests. The senior IRM official expressed similar concerns in a February 15, 1990, memo to all Justice components, in which he stated Justice may face problems managing its information technology contracts effectively. In addition, the Associate Commissioner for the Immigration and Naturalization Service supported this point by saying that she did not have enough qualified personnel to manage contracts.

Justice's Central IRM Office Says It Has Limited Resources and Cannot Fulfill Its Oversight Responsibilities

Justice's central IRM office says limited resources have prevented it from fulfilling its oversight responsibilities. According to an April 1990 Justice planning document titled "Justification for Program and Performance," a major objective of the central IRM office is to "certify that Department components effectively and efficiently manage information resources." Although the central IRM office reviews information systems plans and acquisition lists from Justice component organizations, central IRM officials said staff shortages at that office have prohibited independent audit and evaluation of computer systems. For example, our July 1990 report on computer security pointed out that staff shortages resulted in the lack of oversight by the central IRM office, which contributed to many disturbing security weaknesses in Justice's sensitive computer systems.[12] Similarly, in our September 1990 report on information management at the Department's Immigration and Naturalization Service, we reported that the Service risks admitting illegal aliens and granting benefits to ineligible aliens, and has millions of dollars in uncollectible debts because of unreliable ADP systems.[13] According to Justice, limited resources prevented it from conducting comprehensive oversight of the Service's information management program.

In addition, in July 1988, the Justice Management Division's internal audit staff found that the oversight process conducted by Justice's central IRM office did not include post-implementation reviews.[14] Post-implementation reviews verify that information systems are operated in accordance with Justice policy, and are performing as expected. According to Justice officials, there are still not enough resources to conduct this oversight function.

[12] Justice Automation: Tighter Computer Security Needed (GAO/IMTEC-90-69, July 30, 1990).

[13] Information Management: Immigration and Naturalization Service Lacks Ready Access to Essential Data (GAO/IMTEC-90-75, Sept. 27, 1990).

[14] Audit Report on the Management of Department of Justice Microcomputer Policy, July 1988.

Conclusions and Recommendations

Because Justice (1) has not adequately responded to our past recommendations that were designed to improve its ADP management and operations, and (2) says it lacks sufficient staff with the technical and managerial capabilities to properly conduct large-scale ADP and telecommunications acquisitions, we believe it is highly unlikely that the Attorney General or Justice's senior IRM official can effectively and efficiently manage information resources at Justice.

To strengthen the management of information resources within the Department of Justice, we recommend that the Attorney General

- require that Justice's case management systems have uniform, accurate, and complete information on cases and require that Justice develop an IRM plan;
- clarify the senior IRM official's authority in implementing departmental IRM decisions; and
- augment, where needed, Justice's central IRM office capabilities in the technical and management areas, ADP contract management, and oversight.

We discussed the information contained in this report with Justice officials, and have incorporated their comments where appropriate. As requested by your office, we did not seek written agency comments.

As arranged with your office, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the date of this letter. At that time, we will send copies to the Attorney General, the House and Senate Appropriations Committees, and other interested parties. This report was prepared under the direction of Howard G. Rhile, Director, General Government Information Systems, who can be reached at (202) 275-3455. Other major contributors to this report are listed in appendix III.

Sincerely yours,

Ralph V. Carlone

Ralph V. Carlone
Assistant Comptroller General

Statement of Chairman Jack Brooks
on Denial of Access to Records

BEFORE WE PROCEED WITH THE TESTIMONY OF MR. ROSS AND HIS ABLE DEPUTY, CHARLES TIEFER, AND ASSOCIATE COUNSEL, MICK LONG, I BELIEVE IT WOULD BE USEFUL TO SUMMARIZE THE HISTORY SURROUNDING OUR ACCESS PROBLEMS WITH THE JUSTICE DEPARTMENT ON THE INSLAW INVESTIGATION.

IN AUGUST OF 1989, I NOTIFIED THE ATTORNEY GENERAL THAT I HAD INITIATED AN INVESTIGATION OF A.D.P. MANAGEMENT PRACTICES AT THE DEPARTMENT, INCLUDING A THOROUGH REVIEW OF THE INSLAW CONTROVERSY. I HAD HOPED THAT GIVEN THE SERIOUSNESS OF THE CHARGES AGAINST THE DEPARTMENT, JUSTICE OFFICIALS WOULD COOPERATE FULLY WITH THE COMMITTEE. HOWEVER, AFTER SEVERAL MONTHS OF STONEWALLING AND FOOTDRAGGING BY THE DEPARTMENT, I WAS FORCED TO ASK THE ATTORNEY GENERAL TO PERSONALLY INTERVENE TO ENSURE THE DEPARTMENT PROVIDED OUR INVESTIGATORS WITH FULL AND UNRESTRICTED ACCESS. IN MAY, 1990, THE ATTORNEY GENERAL INFORMED ME THAT AS A RESULT OF MY REQUEST, HE HAD DIRECTED JUSTICE OFFICIALS TO COOPERATE FULLY WITH THE COMMITTEE INVESTIGATION.

ARRANGEMENTS WERE SUBSEQUENTLY MADE FOR THE COMMITTEE'S ACCESS TO DEPARTMENT FILES WHICH WORKED RATHER SMOOTHLY. COMMITTEE INVESTIGATORS INTERVIEWED NUMEROUS CURRENT AND FORMER JUSTICE DEPARTMENT OFFICIALS AND REVIEWED REAMS OF DOCUMENTATION PROVIDED BY THE DEPARTMENT. WHILE THERE WAS SOME DELAY AND OBFUSCATION IN MEETING OUR REQUESTS, FOR THE MOST PART JUSTICE OFFICIALS COOPERATED WITH OUR WORK.

UNTIL SEPTEMBER, THAT IS. SUDDENLY, THIS SPIRIT OF COOPERATION VANISHED AND IN ITS PLACE NEW CLAIMS OF PRIVILEGE AND CONFIDENTIALITY APPEARED. THE CONFLICT APPEARS TO CENTER ON A CLASS OF DOCUMENTS RELATED TO SOMETHING CALLED "LITIGATION STRATEGY" FILES OR SIMPLY "LITIGATION FILES." APPARENTLY, THESE FILES CONTAIN DOCUMENTS WHICH WERE COLLECTED AND STORED BY THE DEPARTMENT TO ASSIST IN ITS LITIGATION OF THE INSLAW CASE.

IN SEPTEMBER, 1990, I WROTE ATTORNEY GENERAL THORNBURGH AND AGAIN ASKED FOR FULL AND OPEN ACCESS. THE ATTORNEY GENERAL RESPONDED THAT HIS EARLIER AGREEMENT TO FULLY COOPERATE WITH THE COMMITTEE DID NOT INCLUDE A COMMITMENT TO RELEASE SENSITIVE DOCUMENTS RELATED TO THE ONGOING LITIGATION OF THE INSLAW CASE. THIS INCLUDED ALL DOCUMENTS AND RECORDS COLLECTED AND USED AT THE BANKRUPTCY COURT AND FEDERAL DISTRICT COURT, EVEN THOUGH DECISIONS HAVE BEEN ALREADY RENDERED BY THOSE COURTS. APPARENTLY, THE DEPARTMENT IS ASSERTING THAT ALL THESE MATERIALS (MORE THAN 200 DOCUMENTS) ARE "PRIVILEGED" AND THEREFORE ARE "SHIELDED" FROM CONGRESSIONAL ACCESS AND SCRUTINY.

AS A RESULT OF THE ATTORNEY GENERAL'S DECISION TO DENY THE COMMITTEE'S ACCESS TO THOSE DOCUMENTS, THE COMMITTEE INVESTIGATION OF THE INSLAW ALLEGATIONS CANNOT BE COMPLETED. I HAVE ASKED THE HOUSE COUNSEL, STEVE ROSS, TO TESTIFY TODAY TO HELP US REVIEW THE LEGITIMACY OF THE ATTORNEY GENERAL'S CLAIMS AND DETERMINE WHETHER THE COMMITTEE SHOULD FORCE THE PRODUCTION OF THESE IMPORTANT RECORDS.

Opening Statement of Congressman Jack Brooks
Hearing on Attorney General's Refusal to Provide
Congressional Access to "Privileged" INSLAW Documents
Subcommittee on Economic and Commercial Law
Wednesday, December 5, 1990

TODAY'S HEARING HAS BEEN CALLED TO REVIEW THE ATTORNEY GENERAL'S DECISION TO DENY THE COMMITTEE ACCESS TO CRITICAL DOCUMENTS INVOLVING THE JUSTICE DEPARTMENT'S DISPUTE WITH THE INSLAW CORPORATION. THESE DOCUMENTS WERE REQUESTED AS PART OF AN ONGOING INVESTIGATION OF ALLEGATIONS THAT HIGH LEVEL DEPARTMENT OFFICIALS CONSPIRED TO FORCE INSLAW INTO BANKRUPTCY AND LIQUIDATE ITS ASSETS. FURTHER, IT HAS BEEN ALLEGED THAT THESE OFFICIALS ALSO ATTEMPTED TO ARRANGE TO HAVE THE COMPANY'S PRIMARY SOFTWARE PRODUCT, CALLED PROMIS, TRANSFERRED OR BOUGHT BY A RIVAL COMPANY.

AS INCREDIBLE AS THIS SOUNDS, FEDERAL BANKRUPTCY JUDGE GEORGE BASON, WHO WILL BE TESTIFYING LATER, HAS ALREADY FOUND MUCH OF THE FIRST PART OF THE ALLEGATION TO BE TRUE. IN HIS DECISION ON THE INSLAW BANKRUPTCY, JUDGE BASON RULED THAT THE DEPARTMENT "TOOK, CONVERTED, AND STOLE" INSLAW'S PROPRIETY SOFTWARE USING "TRICKERY, FRAUD, AND DECEIT." THE JUDGE ALSO SEVERELY CRITICIZED THE DECISION BY HIGH LEVEL DEPARTMENT OFFICIALS TO "IGNORE THE ETHICAL IMPROPRIETIES" ON THE PART OF THE JUSTICE DEPARTMENT OFFICIALS INVOLVED IN THE CASE.

IN NOVEMBER OF 1989, SENIOR DISTRICT COURT JUDGE WILLIAM B. BRYANT UNEQUIVOCALLY SUPPORTED JUDGE BASON'S FINDINGS AND CRITICIZED THE DEPARTMENT FOR ATTEMPTING TO ESCAPE ACCOUNTABILITY BY ASSERTING, AMONG OTHER THINGS, "SOVEREIGN IMMUNITY."

DESPITE THE DRAMATIC FINDINGS OF THE TWO COURTS, THE DEPARTMENT HAS STEADFASTLY DENIED ANY WRONGDOING BY ITS OFFICIALS, CLAIMING THAT ITS CONFLICT WITH INSLAW IS NOTHING MORE THAN A SIMPLE CONTRACT DISPUTE. QUITE FRANKLY, I FIND THIS POSITION A LITTLE HARD TO SWALLOW.

INSLAW ENCOUNTERED PROBLEMS WITH THE DEPARTMENT, OVER RELATIVELY MINOR CONTRACTING ISSUES, ALMOST IMMEDIATELY AFTER RECEIVING ITS CONTRACT IN 1982. INEXPLICABLY, THE CONFLICT BALLOONED INTO A MAJOR CONTROVERSY INVOLVING THE HIGHEST LEVELS OF THE JUSTICE DEPARTMENT, INCLUDING AT LEAST TWO ASSISTANT ATTORNEYS GENERAL, A DEPUTY ATTORNEY GENERAL, AND ATTORNEY GENERAL MEESE, HIMSELF. AFTER EIGHT YEARS AND SEVERAL COURT CASES, THE ISSUE REMAINS UNRESOLVED. UNDOUBTEDLY, HUNDREDS OF THOUSANDS, IF NOT MILLIONS, OF DOLLARS HAVE BEEN SPENT ON LITIGATION. MORE IMPORTANTLY, THE DEPARTMENT'S A.D.P. MODERNIZATION PROGRAM HAS BEEN SET BACK AT LEAST TEN YEARS.

UNFORTUNATELY, THE DEPARTMENT HAS THWARTED ATTEMPTS BY CONGRESS TO LEARN THE COMPLETE TRUTH CONCERNING THE INSLAW CASE. JUSTICE HAS REPEATEDLY DENIED BOTH THE HOUSE AND SENATE INVESTIGATING COMMITTEES ACCESS TO CRITICAL DOCUMENTS THAT MAY PROVE THE DEPARTMENT'S INNOCENCE OR GUILT. AS A RESULT, I AM EVEN MORE CONVINCED THAT THE ALLEGATIONS CONCERNING INSLAW MUST BE FULLY AND INDEPENDENTLY INVESTIGATED BY THE COMMITTEE. HOWEVER, WE CANNOT PROCEED WITH OUR INVESTIGATION UNTIL WE RESOLVE THE CURRENT ACCESS PROBLEMS WITH THE ATTORNEY GENERAL. TODAY, WE WILL HAVE THE OPPORTUNITY TO DISCUSS WITH THE HOUSE COUNSEL, STEVE ROSS, AND HIS DEPUTY, CHARLES TIEFER, THE OPTIONS WE HAVE AVAILABLE TO COMPEL PRODUCTION OF THE REQUESTED MATERIALS.

WE WILL ALSO BE HEARING FROM WITNESSES REPRESENTING THE INSLAW CORPORATION AND, AS I MENTIONED EARLIER, JUDGE BASON. FINALLY, I HAVE ASKED MILT SOCOLAR, SPECIAL ASSISTANT TO THE COMPTROLLER GENERAL, TO PRESENT THE RESULTS OF A G.A.O. AUDIT I REQUESTED OF THE DEPARTMENT'S OVERALL A.D.P. MANAGEMENT AND OPERATION. BELIEVE ME, IT IS NOT A PRETTY PICTURE.

STATEMENT OF ELLIOT L. RICHARDSON

BEFORE THE

ECONOMIC AND COMMERCIAL LAW SUBCOMMITTEE
OF THE HOUSE JUDICIARY COMMITTEE
DECEMBER 5, 1990

STATEMENT OF ELLIOT L. RICHARDSON

Mr. Chairman,

Mr. Chairman, we thank you and the Subcommittee for the opportunity to appear today to testify regarding the INSLAW case. Accompanying me are William A. and Nancy B. Hamilton of INSLAW and Charles R. Work, a partner at McDermott, Will & Emery, who is also counsel to INSLAW.

I first became aware of the work of INSLAW during my service in the Department of Justice in 1973. I came to the Department with a deep interest in the problems of the administration of justice. I wanted to determine what was being done at the Federal level to try to improve not only the management of the Department's caseload, but also to improve the collection of data and to analyze interrelationships of various components of the judicial system. The Institute for Law and Social Research ("INSLAW") had just been founded as a non-profit corporation and was conducting significant work in this area for state and local governments with the support of the Law Enforcement Assistance Administration ("LEAA"), a division of the Department.

With the help of LEAA grants, INSLAW developed case management software called the Prosecutor's Management Information System ("PROMIS"). PROMIS was

then being used in District Attorneys' Offices in large metropolitan areas throughout the United States and on a pilot basis in two large U.S. Attorneys' Offices.

Congress decided in 1980 to terminate the LEAA. So as to make possible the continuation both of service to PROMIS users and the funding of improvements in the software, the Hamiltons founded in January, 1981 a for-profit corporation known as INSLAW, Inc.

It was at this time that I became more directly involved with INSLAW. An old friend, Roderick Hills, who had been doing some legal work for INSLAW, asked me to chair the Board of Trustees of INSLAW, Inc.'s not-for-profit predecessor. The new corporation wished to acquire from the non-profit corporation substantially all of its assets, except for PROMIS itself, which was in the public domain. Harry McPherson and Calvin Collier also agreed to serve as trustees.

Serving in this capacity rekindled my interest in what INSLAW had accomplished; it was obvious that INSLAW was making an important contribution to the administration of justice. Starting here in the District of Columbia, it had done pioneering work on problems having to do with attrition of the criminal case load, problems of recidivism and repeated crimes by individuals whom we now identify as "career criminals." Indeed, the very concept of the "career criminal" grew out of INSLAW's analyses of data. The data further assisted in the development of

programs to improve the plight of victims and witnesses as well as the training of police officers.

Between January, 1981 and March, 1982 the new INSLAW developed a substantially enhanced version of PROMIS, which has since been further improved. This version of PROMIS is proprietary. No other software performs the function of case management as well as it is performed by PROMIS.

In March, 1982, INSLAW entered into a three-year, $10 million contract with DOJ to introduce the public-domain version of PROMIS into the United States Attorneys' Offices. Claiming that INSLAW had no title to the enhanced version of PROMIS, DOJ officials threatened to withhold payments under the contract unless INSLAW turned it over to DOJ. On the advice of its own procurement counsel, DOJ modified its contract with INSLAW in April, 1983 and agreed to pay license fees to INSLAW if and when DOJ decided to use the enhanced version of PROMIS in the U.S. Attorneys' Offices.

In May 1983, DOJ officials initiated a series of contract disputes with INSLAW. I began to act as INSLAW's attorney when Mr. Hamilton asked me to assist him because the Justice Department, for no understandable reason, was withholding substantial amounts of money from INSLAW in connection with these disputes. This inexplicable withholding of funds, coupled with my understanding that

the project manager for the U.S. Attorney's contract had been fired by INSLAW, made me feel that INSLAW must be confronting a situation that could not be explained by any ordinary circumstance of government administration. I thought that it was important, in this situation, to try to find a level in the Department at which there could be some assurance, or hope, that the matter would be dealt with objectively and on the merits. In that connection, I dealt over the next three years with a number of Justice Department officials at a number of different levels.

My efforts over this period were to no avail and by February, 1985, DOJ had withheld nearly $2 million owed to INSLAW, thus forcing INSLAW to seek Chapter 11 protection in the Bankruptcy Court for the District of Columbia. Finally, in 1985, after attending numerous meetings on behalf of INSLAW, including meetings with then Deputy Attorney General Lowell Jensen, I arrived most reluctantly at the conclusion that further meetings were not likely to be fruitful and that INSLAW , to protect its interests, had no choice but to file suit. This INSLAW did in June 1986 in the United States Bankruptcy Court for the District of Columbia.

In its complaint, INSLAW charged DOJ with violations of the automatic stay entered on February 7, 1985, including, <u>inter</u> <u>alia</u>, the assertion of control over INSLAW's proprietary version of PROMIS and the failure to take positive steps to curb the persistent efforts of certain DOJ officials to inflict harm on INSLAW. The suit was tried in the summer of 1987. On January 25, 1988, the Bankruptcy Court

rendered judgments in favor of INSLAW in the amount of $6.8 million plus counsel fees. The Court's principal findings are attached hereto as Exhibit A. The most important of these was that DOJ officials "took, converted, stole" 44 copies of INSLAW's proprietary PROMIS case management software "through trickery, fraud and deceit." The Court also found that DOJ intentionally and willfully sought to cause the conversion of INSLAW's Chapter 11 reorganization case to a Chapter 7 liquidation case "without justification and by improper means." Additionally, the court ruled that DOJ officials, acting on a decision "consciously made at the highest level" ignored "serious questions of ethical impropriety."

On November 22, 1989, the District Court affirmed the Bankruptcy Court's judgments. In an accompanying memorandum, the District Court stated that "after careful review of all of the volumes of transcripts of the hearings before the bankruptcy court, the more than 1,200 pages of briefs and supporting appendices and all other relevant documents in the record, there is convincing, perhaps compelling support for the findings set forth by the bankruptcy court." The court also found it "strikingly apparent . . . that INSLAW performed its contract in a hostile environment that extended from the higher echelons of the Justice Department to the officials who had the day-to-day responsibility for supervising its work." Even the undisputed facts, the court added, compelled "the same conclusion reached by the bankruptcy court; the government acted willfully and fraudulently to obtain property that it was not entitled to under the contract."

But the combination of high-level hostility and lower-level vindictiveness could not sufficiently account for the persistence and tenacity of the attempts to wrest control of PROMIS from INSLAW. These began with DOJ's refusal to recognize INSLAW's ownership of enhanced PROMIS. Then came an offer from Hadron, Inc., a software company controlled by a long-time friend of Edwin Meese, to buy INSLAW. When Hamilton refused the offer, the chairman of Hadron said, "We have ways of making you sell." Soon thereafter a New York-based venture capital firm, following a meeting with a businessman who claimed to have access to the highest levels of the Reagan Administration, tried to induce the Hamiltons to turn over to the firm their voting rights in INSLAW's common stock. When the contract disputes forced INSLAW to seek the protection of Chapter 11, DOJ attempted to push INSLAW into liquidation. After this failed, DOJ officials encouraged a Pennsylvania-based computer services company to launch a hostile takeover bid for INSLAW.

We believe that these attempts to acquire control of PROMIS were linked by a conspiracy among friends of Attorney General Edwin Meese to take advantage of their relationship with him for the purpose of obtaining a lucrative contract for the automation of the Department's litigating divisions. Among the facts pointing to the existence of this conspiracy are the following:

(a) Between 1958 and 1966, Edwin Meese and D. Lowell

Jensen served together in the Alameda County, California, District Attorney's office. From 1966 to 1974, Meese was a key aide to Governor Ronald Reagan. From 1970 to 1975 , Dr. Earl Brian served in Governor Reagan's Cabinet. In January 1981, Meese became Counsellor to President Reagan. In 1981 and 1982, Brian served in the White house as the Chairman of a task force which reported to Mr. Meese.

(b) When Meese joined the Reagan Administration, Brian was the controlling shareholder in Biotech Capital Corporation. Biotech controlled Hadron, Inc., a company which specialized in integrating computer-based information management systems. This was the company which tried to buy INSLAW.

(c) Mrs. Meese bought stock in Biotech's first public offering with money borrowed from Edwin Thomas, soon to be an aide to her husband. Brian lent Thomas $100,000 for the purchase of a house in Washington. Mrs. Meese later bought stock in American Cytogenetics, another Brian company.

(d) In June, 1983, a DOJ "whistleblower" warned the staff of Senator Max Baucus that, as soon as Meese became Attorney General, unidentified friends of Meese would be awarded a "massive sweetheart contract" to install PROMIS in every litigation office of DOJ. According to a statement made to Judge Jane Solomon of the Civil Court of the City of New York, Stanton's attempt to force INSLAW into liquidation was part of a "conspiracy to get the INSLAW software." Several high-level DOJ officials spoke of DOJ's determination to "get" or "bury" INSLAW. One DOJ employee said that Jensen was behind this effort. A second attributed the award to Hadron of a $40 million computer services contract for litigation support in the Lands Division to the influence of a Deputy Assistant Attorney General with close ties to Meese. Other DOJ employees connected Meese, Brian, and Hadron with the harassment of INSLAW and the attempt to acquire PROMIS.

When Meese became Attorney General in February 1985, he and Jensen took steps to meet DOJ's long-recognized need for comprehensive case-

management systems. A request for proposals was announced on May 25, 1986. The initial cost estimates for this procurement, code-named "Project EAGLE," exceeded $200 million; options to expand the contract could increase the cost to three or four times this amount. The request for proposals contained no provision for the acquisition or development of case-management software. The Project EAGLE computers would be largely wasted without this software. Undisclosed provisions of the Project EAGLE procurement did in fact mandate technical specifications for the use of PROMIS. DOJ's failure to publish a specific requirement for case-management software implied an understanding that the winner of the Project EAGLE contract would be an entity which already controlled such software, i.e., PROMIS.

In late April, 1988, Ronald LeGrand, Chief Investigator of the Senate Judiciary Committee, telephoned Hamilton. LeGrand said that he was calling at the request of an unnamed senior official in DOJ whom he had known for 15 years and regarded as completely trustworthy. According to this official, the INSLAW case was "a lot dirtier for the Department of Justice than Watergate had been, both in its breadth and depth." The official asked LeGrand to inform the Hamiltons that the Justice Department had been compromised on the INSLAW case at every level, and that Jensen had engineered INSLAW's problems right from the start. The official also said that senior career officials in the Criminal Division knew all about this malfeasance but would not disclose what they knew except in response to a

management systems. A request for proposals was announced on May 25, 1986. The initial cost estimates for this procurement, code-named "Project EAGLE," exceeded $200 million; options to expand the contract could increase the cost to three or four times this amount. The request for proposals contained no provision for the acquisition or development of case-management software. The Project EAGLE computers would be largely wasted without this software. Undisclosed provisions of the Project EAGLE procurement did in fact mandate technical specifications for the use of PROMIS. DOJ's failure to publish a specific requirement for case-management software implied an understanding that the winner of the Project EAGLE contract would be an entity which already controlled such software, i.e., PROMIS.

In late April, 1988, Ronald LeGrand, Chief Investigator of the Senate Judiciary Committee, telephoned Hamilton. LeGrand said that he was calling at the request of an unnamed senior official in DOJ whom he had known for 15 years and regarded as completely trustworthy. According to this official, the INSLAW case was "a lot dirtier for the Department of Justice than Watergate had been, both in its breadth and depth." The official asked LeGrand to inform the Hamiltons that the Justice Department had been compromised on the INSLAW case at every level, and that Jensen had engineered INSLAW's problems right from the start. The official also said that senior career officials in the Criminal Division knew all about this malfeasance but would not disclose what they knew except in response to a

GAO Reports

subpoena and under oath. LeGrand has since told the Hamiltons and others that his informant would come forward only if assured of protection against reprisal.

DOJ is aware of most of these facts. Some are set forth in the Bankruptcy Court's findings of fact; some are contained in a written statement furnished to the Public Integrity Section of DOJ's Criminal Division (the "Section") in February, 1988 by William and Nancy Hamilton; many are recapitulated and supplemented in my letter of May 11, 1989 to Attorney General Thornburgh, which is appended hereto as Exhibit B.

On May 4, 1988, the Section informed INSLAW that it would investigate some of the allegations made by the Hamiltons and their counsel. On July 18, 1989, the Section notified INSLAW that its investigation of INSLAW's allegations "has been completed and that prosecution has been declined, due to lack of evidence of criminality." The Section had not, in fact, conducted a comprehensive, thorough, or credible investigation.

Last December, INSLAW contacted each of the 30 individuals who have furnished information on which these allegations are based. Each was asked whether or not anyone representing DOJ had communicated or attempted to communicate with her or him. The only one who responded affirmatively is Judge Jane Solomon. On December 11, 1989, LeGrand told INSLAW that DOJ had not to

GAO Reports

subpoena and under oath. LeGrand has since told the Hamiltons and others that his informant would come forward only if assured of protection against reprisal.

DOJ is aware of most of these facts. Some are set forth in the Bankruptcy Court's findings of fact; some are contained in a written statement furnished to the Public Integrity Section of DOJ's Criminal Division (the "Section") in February, 1988 by William and Nancy Hamilton; many are recapitulated and supplemented in my letter of May 11, 1989 to Attorney General Thornburgh, which is appended hereto as Exhibit B.

On May 4, 1988, the Section informed INSLAW that it would investigate some of the allegations made by the Hamiltons and their counsel. On July 18, 1989, the Section notified INSLAW that its investigation of INSLAW's allegations "has been completed and that prosecution has been declined, due to lack of evidence of criminality." The Section had not, in fact, conducted a comprehensive, thorough, or credible investigation.

Last December, INSLAW contacted each of the 30 individuals who have furnished information on which these allegations are based. Each was asked whether or not anyone representing DOJ had communicated or attempted to communicate with her or him. The only one who responded affirmatively is Judge Jane Solomon. On December 11, 1989, LeGrand told INSLAW that DOJ had not to

GAO Reports

that date, made any attempt to obtain from him the identity of his informant. Although William Hamilton's detailed recollections of past events and conversations have frequently been corroborated by later-discovered documents or subsequent testimony, DOJ has never sought to interview him. To the best of our knowledge, DOJ has not attempted to obtain relevant documents, correspondence, notes, appointment calendars, or telephone logs from any of the individuals or entities identified in the Hamiltons' statement to the Section and has ignored the leads called to its attention in my letter of May 11, 1989.

The Department of Justice has a clear duty under the Constitution and laws of the United States to take care that the laws are faithfully executed. This duty embraces responsibilities both to enforce the criminal laws and to conduct civil litigation fairly. DOJ's duty to enforce the criminal laws obliges them, whenever they initiate an investigation of wrongdoing, to pursue the evidence as far as may be necessary to make a proper determination as to the course of action thereby indicated. DOJ's duty of fairness toward citizens with whom they are engaged in litigation requires them to develop a full and fair record and to refrain from instituting or continuing litigation that is demonstrably unfair. By failing and refusing to conduct a sufficient investigation in this matter, DOJ has breached and neglected these duties in a manner that cannot reasonably be defended.

The Department's failure and refusal to conduct an adequate criminal

GAO Reports

investigation or to examine conscientiously the merits of INSLAW's contract claims has forced INSLAW to retain lawyers and private investigators and to expend countless hours of its staff's time in an effort to discover information that would have been obtained by DOJ if they had properly performed their duties.

While neglecting to investigate its own wrongdoing, the Department sought and obtained court authority for the government to audit, for the eighth time, INSLAW's performance under the PROMIS contract. This redundant audit has diverted the time and energy of INSLAW's management from the effort to rebuild the company and has forced INSLAW to incur significant additional legal and accounting expenses.

INSLAW has exhausted all the available administrative means of inducing the Department to conduct a fair and thorough investigation. INSLAW requested the appointment of an Independent Counsel pursuant to the Ethics in Government Act; this request was denied on May 4, 1988. INSLAW's attempt to stimulate the Public Integrity Section to take appropriate action ended with the Section's letter of July 18, 1989 declining prosecution. INSLAW's counsel wrote the Department on August 10, 1989 calling attention to the inadequacies of the Section's purported investigation, but DOJ refused to reopen the matter. INSLAW then sought review by the Special Division of the Circuit Court of Appeals for this District of the Department's failure to appoint Independent Counsel, but the Division concluded

GAO Reports

that it lacked jurisdiction over this request. DOJ has never replied to my letter of May 11, 1989 (Exhibit B). DOJ possesses investigative resources and powers vastly more extensive than those available to INSLAW but has resisted every effort to persuade them to make adequate use of those resources. Only Attorney General Thornburgh can assure DOJ employees otherwise willing to tell the truth that their doing so will not cost them their jobs.

In my judgment, the Bankruptcy Court findings alone should have spurred the Department to take swift, corrective action. DOJ's decision to forego and refuse a serious investigation into the Bankruptcy Court's findings and INSLAW's additional charges reflects the direct and irreconcilable conflict of interest which plagues DOJ's exercise of its investigative and prosecutorial functions in the matter.

The evidence assembled by INSLAW cries out for an investigation going beyond what INSLAW has been able to do with its own limited resources and drawing upon the full array of DOJ's legal powers and professional skills. INSLAW's allegations are more than sufficient to call upon DOJ to fulfill its responsibilities toward the firm and impartial enforcement of the criminal laws and the fair assessment of INSLAW's claims. DOJ has not carried out these responsibilities. It has not conducted the kind of investigation that would be necessary in order to determine whether or not DOJ officials were part of a conspiracy to destroy INSLAW. Until and unless there is a comprehensive, thorough and hardhitting

GAO Reports

investigation, INSLAW will continue to be the victim of their persisting unfairness.

It was foreseeable that such an investigation would not only expose widely ramified criminal conduct on the part of Departmental employees, but also make the Department liable for punitive and consequential damages much larger than the $6.8 million already awarded. The less the Department knew of the facts, the more easily it could rationalize the non-performance of duty and minimize these risks. The Department could not completely duck an investigation, but it might get away with a superficial one. Taking that chance, the Public Integrity Section of the Criminal Division initiated a cursory review of INSLAW's charges, but made no serious attempt to determine their validity.

Because the Department refused to investigate INSLAW's allegations, INSLAW, at my suggestion, filed a Petition for a Writ of Mandamus requesting that the Court order a full and thorough investigation of INSLAW's allegations. At the very heart of INSLAW's petition was the assertion that the Justice Department had not made a serious effort to determine whether or not INSLAW's factual allegations are true. In opposing INSLAW's petition, the Justice Department did not deny the facts. As Judge Bryant pointed out in his opinion, they did not deny that the Public Integrity Section contacted only one of the many persons who furnished information on which the allegations in INSLAW's petition were based.

GAO Reports

The Department, if it had done no more than match INSLAW's own investigative efforts would have identified the same individuals INSLAW identified and obtained the same information that INSLAW obtained. The Department did none of these things. To the contrary, it wound up a superficial inquiry without contacting more than one of INSLAW's key witnesses, without following up any of the leads furnished by INSLAW,, and without attempting to obtain the most obviously relevant documents and correspondence. Given these gross deficiencies, the Justice Department cannot plausibly claim that they fulfilled either their duty to enforce the criminal laws or their duty of fairness in their conduct of civil litigation.

INSLAW does not contend that the facts it has assembled are sufficient to prove a criminal conspiracy. It does contend, however, that these facts, coupled with the Bankruptcy Court's findings, create an imperative need for a thorough, hardhitting, and impartial investigation. Despite a great deal of time and expense devoted to developing a full explanation of the Department's malfeasance, INSLAW has not been able to pursue all the indicated leads, talk to all the available witnesses, or examine all the relevant documents. And even if they could, INSLAW still will not have means of obtaining critically important testimony anywhere near comparable to those at the command of the Department.

Against this background, the Department's statement of July 18, 1989 that its investigation had been terminated "due to lack of evidence of criminality" cannot

be accepted at face value. The termination is better explained on the basis that the Department felt trapped by its conflict of interest. At the time of the statement, the Civil Division was resisting INSLAW's claims on grounds which, had they been thoroughly investigated by the Criminal Division, might well have been found to be lacking in merit. The Department's duty to investigate the charges of a criminal conspiracy involving its own employees clashed with its interest in minimizing or defeating the civil damage claims against the Department. The Bankruptcy Court's findings and INSLAW's allegations impugned the Department's integrity. They implicated senior colleagues of the investigators themselves. Departmental pride was at stake. Rather than face the facts, it was easier to look for rationalizations, such as 'the evidence did not add up to the conclusive proof of crime,' 'everybody does favors for political friends,' or 'the Hamiltons are suffering from a persecution complex.' As the Bankruptcy Court observed, respondents' reaction was "to circle the wagons."

Judge Bryant denied the Petition for a Writ of Mandamus on grounds that INSLAW lacked standing, and on the grounds that prosecutorial discretion is generally unreviewable. He stated in a footnote, however, that:

> "Importantly, the House Judiciary Committee is presently investigating the activities of the Department and its then officials, employees, and friends as to the existence of a conspiracy of the type and magnitude alleged by INSLAW. The Washington Post reports that "[a]fter months of negotiations, Attorney General Dick Thornburgh has now assured the

GAO Reports

Judiciary Committee Chairman Jack Brooks (D-TX) that his inquiry will have the full cooperation of the Department. Committee investigators will have direct access to Department personnel and documents, and employees will be assured that they can testify without fear of retribution." "Mr. Thornburgh Cooperates," The Washington Post, April 28, 1990, at A22. Clearly, this House committee is a body far better placed in the governmental scheme of things than the court (with resources unmatched in the Judiciary) to undertake such an evaluation."

INSLAW is left with only one recourse and that is the Congress. There is an inscription in the rotunda outside the office of the Attorney General of the United States that states, "The United States wins its point whenever justice is done its citizens in the courts." The Justice Department has chosen to ignore this principle; the Congress of the United States must remind the Justice Department that they are not just words inscribed on the rotunda to impress visitors to the Justice Department, but, rather, words that express a covenant between the Government and the American people.

[illegible] concludes my prepared statement, Mr. Chairman. I would be happy to [illegible]nd to the Committee's questions.

STATEMENT OF WILLIAM A. AND NANCY B. HAMILTON

BEFORE THE

ECONOMIC AND COMMERCIAL LAW SUBCOMMITTEE

OF THE HOUSE JUDICIARY COMMITTEE

DECEMBER 5, 1990

Mr. Chairman, we are William A. and Nancy Burke Hamilton, the President and Vice President, respectively, of INSLAW, Inc. We are the principal founders and owners of the Company, and husband and wife.

We would like to express our appreciation to you, Mr. Chairman, and to the Subcommittee on the Judiciary for giving us this opportunity to testify about what we believe is serious malfeasance against INSLAW, Inc., by the United States Department of Justice that began in 1981 and continues to this day.

A. **The Justice Department's Effort to Portray the INSLAW Case as a Government Contract Dispute is Reminiscent of the Initial Pretense That Watergate was Just a Burglary.**

In January 1988, the United States Bankruptcy Court for the District of Columbia ruled that officials of the Justice Department had stolen "through trickery, fraud and deceit" 44 copies of the PROMIS legal case management computer software manufactured by INSLAW, and then implemented a covert plan to force INSLAW's liquidation "without justification and by improper means."

In November 1989, the U.S. District Court issued a 44-page Opinion and Order, stating that the evidence was sufficient to affirm the findings "under any standard of review," and observing that the misconduct against INSLAW emanated from "higher echelons" of the Justice Department.

The Justice Department has not accepted the rulings of either of these federal courts, choosing, instead, to appeal the matter further to the U.S. Court of Appeals, where it is currently pending.

The Justice Department has repeatedly attempted to portray the INSLAW case as nothing more than an unusually acrimonious government contract dispute. We believe that this effort is about as credible as the government effort, a decade and a half ago, to portray Watergate as nothing more than a third rate burglary.

B. **The Reagan White House Decision in Early 1981 to Launch a Massive Contract at the Justice Department for the Implementation of INSLAW's PROMIS Case Management Software in Every Litigative and Investigative Office of the Justice Department.**

GAO Report

In 1980, Congress mandated, through the Appropriations Authorization Act, that the Justice Department implement a uniform case management software system throughout all of its litigation activities in the United States, including the 94 U.S. Attorneys' Offices. The objective was to provide better management statistics to the Congress and the Office of Management and Budget on the use of litigative resources.

During the hearings before the Senate Judiciary Committee that preceded this mandate, Justice Department officials testified that they expected to use the PROMIS software created by INSLAW, Inc. to satisfy this Congressional mandate.

At a meeting in the White House on May 4 or 5, 1981, Edwin Meese, then Counsellor to the President, told Donald Santarelli, a former Presidential appointee in the Nixon Justice Department and an attorney for INSLAW, that the Reagan Administration had already decided to launch a massive contract at the Justice Department to implement the PROMIS software in all 94 U.S. Attorneys' Offices, all of the legal divisions in Washington, and in Justice Department agencies such as the Drug Enforcement Administration, the U.S. Marshals Service, the Immigration and Naturalization Service, the Bureau of Prisons, and the FBI, if the FBI could be persuaded to cooperate.

Meese told Santarelli that D. Lowell Jensen, then the Assistant Attorney General for the Criminal Division, would spearhead the arrangements within the Justice Department for this massive procurement.

Finally, Meese warned Santarelli that INSLAW should not expect that it would automatically receive the PROMIS contract.

C. <u>The Reagan White House and Justice Department Deliberately Lay the Foundation in 1981 and 1982 for the Later Sabotage of INSLAW's Contract.</u>

The Carter Justice Department had planned to implement PROMIS in the 20 largest U.S. Attorneys' Offices, based on a successful pilot test of PROMIS in U.S. Attorneys' Offices in New Jersey and in San Diego, California.

Meese told Santarelli, however, that the Reagan Administration was not going to be content with such a modest scope of implementation of PROMIS because the Reagan Administration, in contrast to the Carter Administration, was pro-law enforcement.

One of the first actions that Jensen apparently took in 1981 vis-a-vis PROMIS

GAO Reports

was to approach Stan Morris, then Associate Deputy Attorney General, in an effort, curious in light of Meese's statements to Santarelli, to scuttle the plan for a procurement to implement PROMIS in the 20 largest U.S. Attorneys' Offices. Both Morris and Jensen testified about this Jensen effort in depositions taken by INSLAW in 1987. Morris declined to heed Jensen's advice.

By June 1981, Justice Department officials knew that the 20-city PROMIS procurement would be going forward; that INSLAW would most probably win the competitive procurement; and that the Justice Department would have to take steps to subvert INSLAW's expected contract. This, according to Frank Mallgrave, then Assistant Director of the Executive Office for U.S. Attorneys, is what Larry McWhorter, then the Deputy Director of the Executive Office, told him in words or substance in May or June 1981.

The Justice Department did not waste any time in preparing to subvert the 20-city PROMIS Implementation Contract that it expected INSLAW to win.

In August 1981, McWhorter recruited C. Madison Brewer, a fired employee of INSLAW, as the full-time PROMIS Project Manager at the Justice Department. McWhorter admitted in his 1987 testimony that he recruited Brewer because he knew that Brewer had previously been employed at INSLAW and he expected INSLAW to win the procurement. Although McWhorter denied knowing that INSLAW had fired Brewer, the Bankruptcy Court did not believe McWhorter. As demonstrated at the 1987 trial, Brewer did not have the kind of experience or training in computer software or project management that would normally be a pre-requisite for appointment to such a position.

To bring Brewer in, McWhorter had to force the incumbent PROMIS Project Manager, Patricia Goodrich, to vacate the position. McWhorter did this, even though Goodrich had experience in the very disciplines that Brewer lacked.

In September 1981, the Justice Department also forced the incumbent PROMIS Contracting Officer, Betty Thomas, to vacate her position. Elizabeth Rudd, a senior procurement official at the Justice Department, threatened during the summer of 1981 to bring charges of "non-feasance" against Thomas unless she stepped aside. Rudd then went outside the Justice Department for the new PROMIS Contracting Officer, selecting Peter Videnieks from the Treasury Department's Customs Service.

When Videnieks joined the Justice Department, he vacated his position at the Customs Service as Contracting Officer for several contracts between Customs and subsidiaries of Hadron, Inc. Earl Brian, who served as Secretary of Health and Welfare in California under Governor Ronald Reagan, effectively controlled Hadron throughout the 1980's, by having the right to name four of the six members of

Hadron's Board of Directors. Earl Brian is also a key figure in the malfeasance against INSLAW.

As INSLAW later discovered, the Reagan White House and Justice Department intended to award the massive PROMIS contract to selected "friends" of the Reagan Administration, including Earl Brian. We highlight evidence of this later in our written testimony.

At the time that the Justice Department hired Videnieks in September 1981, Brian was serving as the unpaid Chairman of a White House Task Force on Health Care Cost Reduction, reporting to Meese. In 1982, Brian also served with Meese on a cabinet-level White House Committee with the title, ironic in view of the facts of the INSLAW case, of "Pro Comp" for "pro-competition."

In 1987, the Bankruptcy Court issued a Permanent Injunction against Brewer and Videnieks ever again having any official duties at the Justice Department relating to INSLAW, because of their protracted and outrageous misconduct against the Company. Well before March 1982, when INSLAW won its three-year PROMIS Implementation Contract, Brewer and Videnieks had been positioned to sabotage the contract.

The Bankruptcy Court later found that within one month of the award of the contract to INSLAW, Brewer and Videnieks had participated in a meeting at the Justice Department to discuss terminating the newly-awarded three-year contract, and to discuss ways to harm INSLAW's interests under each of the other contracts that INSLAW then had with the Justice Department.

The Bankruptcy Court also later found that by the end of 1982 both Videnieks and Brewer had authored separate internal Justice Department documents forecasting INSLAW's demise as a company, and the takeover of the PROMIS technology by the government.

D. <u>In 1983, the Justice Department and a Key Reagan Administration Political Supporter by the Name of Earl Brian Take Action to Sabotage INSLAW's Contract So That the Justice Department Can Award a Massive Sweetheart Contract to Friends of the Reagan Administration.</u>

The triggering event for the implementation of Brewer's and Videnieks's written plans for INSLAW's demise was INSLAW's refusal in April 1983 to be purchased by Hadron, Inc., a company then controlled by Earl Brian.

Dominick Laiti, then Chairman of Hadron, Inc., had telephoned Bill Hamilton

Hadron's Board of Directors. Earl Brian is also a key figure in the malfeasance against INSLAW.

As INSLAW later discovered, the Reagan White House and Justice Department intended to award the massive PROMIS contract to selected "friends" of the Reagan Administration, including Earl Brian. We highlight evidence of this later in our written testimony.

At the time that the Justice Department hired Videnieks in September 1981, Brian was serving as the unpaid Chairman of a White House Task Force on Health Care Cost Reduction, reporting to Meese. In 1982, Brian also served with Meese on a cabinet-level White House Committee with the title, ironic in view of the facts of the INSLAW case, of "Pro Comp" for "pro-competition."

In 1987, the Bankruptcy Court issued a Permanent Injunction against Brewer and Videnieks ever again having any official duties at the Justice Department relating to INSLAW, because of their protracted and outrageous misconduct against the Company. Well before March 1982, when INSLAW won its three-year PROMIS Implementation Contract, Brewer and Videnieks had been positioned to sabotage the contract.

The Bankruptcy Court later found that within one month of the award of the contract to INSLAW, Brewer and Videnieks had participated in a meeting at the Justice Department to discuss terminating the newly-awarded three-year contract, and to discuss ways to harm INSLAW's interests under each of the other contracts that INSLAW then had with the Justice Department.

The Bankruptcy Court also later found that by the end of 1982 both Videnieks and Brewer had authored separate internal Justice Department documents forecasting INSLAW's demise as a company, and the takeover of the PROMIS technology by the government.

D. <u>In 1983, the Justice Department and a Key Reagan Administration Political Supporter by the Name of Earl Brian Take Action to Sabotage INSLAW's Contract So That the Justice Department Can Award a Massive Sweetheart Contract to Friends of the Reagan Administration.</u>

The triggering event for the implementation of Brewer's and Videnieks's written plans for INSLAW's demise was INSLAW's refusal in April 1983 to be purchased by Hadron, Inc., a company then controlled by Earl Brian.

Dominick Laiti, then Chairman of Hadron, Inc., had telephoned Bill Hamilton

on or about April 20, 1983. Laiti said that he wanted to get together to arrange the purchase of INSLAW because Hadron needed title to PROMIS. Laiti said that Hadron had connections with Meese in the White House that would enable Hadron to obtain the federal government's case management software business, but that Hadron would need to have the PROMIS software for the anticipated contracts. When Bill Hamilton declined to meet with Laiti, Laiti issued the following threat: "we have ways of making you sell." Laiti also noted that Ms. Meese then owned stock in his company. Ms. Meese did, in fact, own stock in Biotech Capital Corporation at that time, according to the subsequent report of Independent Counsel Jacob Stein. Biotech Capital Corporation, currently known as Infotechnology, does, in turn, control four of the six seats on Hadron's Board of Directors. Brian was then CEO of Biotech.

During the ensuing 90-day period, the Justice Department made good on Laiti's threat. A series of contract disputes suddenly developed. Videnieks used these non-adjudicated disputes as pretexts to withhold payments to INSLAW for services rendered under the contract. Eventually, Videnieks withheld payment of about $2 million for services rendered. On February 7, 1985, INSLAW filed for bankruptcy protection because of these withholdings.

Under federal government contract law, a vendor may not stop work when a dispute arises. In return, the Government may not withhold payment until the dispute is adjudicated. Videnieks and the Justice Department ignored that bedrock principle of government contract law. To this day, the Justice Department has never paid INSLAW a penny of the money Videnieks illegally withheld, despite devastating condemnation of Videnieks' misconduct against INSLAW by the Bankruptcy Court.

Five years after this illegal withholding began, INSLAW learned from several informants that Jensen had engineered the disputes as a ruse for driving INSLAW out of business. For example, Ronald LeGrand, then Chief Investigator of the Senate Judiciary Committee, contacted us in May 1988 and told us that a trusted senior Justice Department career official, whom LeGrand had by then known for 15 years, had asked LeGrand to pass certain information on to us.

According to LeGrand, his trusted source claimed that Jensen had engineered INSLAW's contract disputes "right from the start" in order "to get INSLAW out of the way and give the business to friends."

According to LeGrand, his source had read an early 1988 <u>Barron's</u> cover story about INSLAW, and had made the observation that INSLAW's hypothesis was correct in viewing the misconduct already found by the court as only a small part of a much larger procurement fraud involving Meese, Jensen and Brian. According to LeGrand, however, his source also warned that we did "not know squat about

how dirty the INSLAW matter really is" and that we "would be sickened if we ever learned even half of it." LeGrand said his source was employed in the Criminal Division at the time of Watergate, and that his source had claimed that the INSLAW matter is "a lot dirtier for the Justice Department than Watergate was, in both its breadth and its depth."

In June 1983, at the time that the contract disputes initially arose, a Justice Department "whistle-blower" warned Congress that Jensen and Meese had a plan to award "a massive sweetheart contract to their friends" to implement PROMIS in every litigation office of the Justice Department, as soon as Meese became Attorney General. The whistle-blower gave the warning to the staff of Senator Max Baucus, who ordered a General Accounting Office investigation of the allegation, shortly after Meese was nominated as Attorney General in January 1985.

In September 1983, about six months after the contract disputes had arisen, Brian, Laiti, and others gathered in New York City for meetings with institutional investors about buying the PROMIS software, according to witnesses located by INSLAW.

After meeting with Brian, Laiti and a colleague named Paul Wormeli visited Brian's long-time investment bank, Allen and Company, and met with Herbert A. Allen, Jr., the CEO, and Mark Tessleman, then a Vice President. According to Wormeli, Hadron was seeking $7 million in equity capital for its criminal justice expansion plans. According to Marilyn Titus, a former secretary at Hadron, Brian, Laiti and Wormeli went to New York "to raise the capital to buy the court software."

Obviously, Hadron knew that the PROMIS court software was not for sale. Nevertheless, during the same month of September 1983, someone described to William Hamilton as "a businessman with ties to the highest level of the Reagan Administration" met with representatives of one of INSLAW's institutional investors, 53rd Street Ventures.

This unidentified businessman talked about how William Hamilton had rebuffed Hadron's acquisition overture earlier in the year; about how INSLAW had then subsequently confronted contract disputes at the Justice Department and about the fact that these disputes would prove to be irresolvable.

According to Jonathan Ben Cnaan, the 53rd Street Ventures officer who related this account to William Hamilton in October 1983, the "businessman" was determined to wrest control of PROMIS from INSLAW for use in contracts with the federal government.

Ben Cnaan warned Hamilton to walk away from the Justice Department contract and allow the "businessman" to use the PROMIS software for contracts

with the Reagan Administration, or face destruction by this friend of the Reagan White House.

On December 29, 1983, virtually on the eve of Meese's nomination as Attorney General, Jensen pre-approved a plan for Videnieks to use the sham contract disputes as justification for terminating the INSLAW contract for default.

E. <u>The Sabotage and Planned Destruction of INSLAW Is Temporarily Stalled by Two Investigations of Meese in 1984</u>

Meese was nominated as Attorney General in late January 1984.

In early February 1984, acting on the June 1983 warning from a Justice Department whistle-blower, Senator Max Baucus, then a member of the Senate Judiciary Committee, asked the General Accounting Office to investigate the allegations about plans for Meese and Jensen to award a massive sweetheart contract to unidentified friends for the installation of PROMIS.

Within days of the start of the investigation, Jensen de-escalated the planned termination of the INSLAW contract for default into a partial termination of the contract for the convenience of the government.

While the GAO investigation was underway, the U.S. Court of Appeals appointed Jacob Stein as Independent Counsel to investigate certain allegations about Meese that had arisen at the start of Meese's confirmation hearings. One of the allegations was that Meese had failed to disclose his family's equity interests in two companies controlled by Earl Brian.

In September 1984, both the GAO and the Stein investigations ended. Stein was unable to find evidence that Meese's failure to disclose his family's equity interest in Brian-controlled companies resulted from a plan to award a sweetheart contract to those companies. GAO apparently assumed that INSLAW would have been the logical beneficiary of any massive sweetheart contract on PROMIS and concluded that the Justice Department hostility toward INSLAW was so great as to make any sweetheart arrangement totally implausible.

GAO evidently did not realize that the Justice Department intended to put INSLAW out of business and then award the massive sweetheart contract to Brian. Stein, in turn, may not have even known about the GAO investigation.

What Stein did, in fact, know, according to the official records of his investigation at the National Archives and Records Service, was that Meese's White

House Staff had been unable to locate Meese's telephone logs for large parts of 1983. Stein could not have known, however, that the time periods for the missing logs coincided with the acquisition overture by Hadron, the implementation of Laiti's threat through the initiation of the sham contract disputes, and the trip to New York by Brian and Laiti to raise the capital to buy PROMIS.

INSLAW learned through litigation discovery in 1987 that Jensen's telephone logs from his tenure at the Justice Department are also unavailable. Jensen took all of his telephone logs with him when he left the Justice Department in the summer of 1986.

Stein probably could not have known either that Meese's defense counsel, in the Stein investigation, Dickstein, Shapiro and Morin, shredded 40 bankers' boxes full of Meese's White House records. INSLAW learned this from two former employees of that law firm who participated in the shredding: Henry Darrington and Timothy Walker.

F. Meese Becomes Attorney General in February 1985 as INSLAW Is Forced into Bankruptcy

On February 7, 1985, INSLAW filed for Chapter 11 bankruptcy protection because the Justice Department had by then illegally withheld payment of about $2 million for services rendered under the contract.

Later the same month, Meese was confirmed as Attorney General.

As the Bankruptcy Court later ruled, the Justice Department, immediately after INSLAW filed for protection, implemented a covert plan to force INSLAW's liquidation "without justification and by improper means."

Justice Department attorneys presented themselves at meetings of INSLAW's creditors and in Bankruptcy Court in 1985. They described the Justice Department as INSLAW's largest unsecured creditor. They demanded that INSLAW disclose to the Justice Department the names of all of INSLAW's customers and prospects.

The Bankruptcy Court issued a Confidentiality Order in July 1985, barring the Justice Department from having access to this information. That Order effectively stymied the Justice Department's covert 1985 plan to liquidate INSLAW.

G. **In December 1985, Jensen and Meese Launch the Most Massive Procurement in Justice Department History: The Uniform Office Automation and Case Management Project, Code-named Project EAGLE**

On December 9, 1985, Jensen officially chartered Project EAGLE, the Uniform Office Automation and Case Management Project. The Justice Department issued the EAGLE Request for Proposals in May 1986.

In August 1986, the Justice Department amended the pending procurement to require that every EAGLE computer be equipped with certain features.

In September 1986, the Justice Department published to all EAGLE bidders an unequivocal denial that these features implied an undisclosed plan to implement PROMIS as the uniform case management software for EAGLE.

By April 15, 1988, however, the Justice Department had admitted in a pleading filed in U.S. District Court in the INSLAW litigation that the very same features that it had mandated in the August 1986 Amendment were mandated to give the government the option of implementing PROMIS on the EAGLE computers.

H. **INSLAW Files Suit Against the Justice Department and Is Immediately Subjected to a Hostile Takeover Attempt By a Company Whose Actions Were Encouraged by the Justice Department**

In June 1986, INSLAW filed suit against the Justice Department in U.S. Bankruptcy Court, alleging that officials of the Justice Department were unlawfully exercising control over INSLAW's proprietary PROMIS software in violation of the automatic stay.

Just as INSLAW filed the lawsuit, Systems and Computer Technology, Inc. (SCT) of Malvern, Pennsylvania, secretly approached INSLAW's Unsecured Creditors' Committee with an offer of $3.6 million in cash for the Company's debts, provided that the Committee would support a forced sale of INSLAW to SCT.

Counsel for INSLAW's Unsecured Creditors' Committee then immediately filed a motion in Bankruptcy Court asking the court to strip INSLAW of court protection so that the Committee could negotiate the sale of INSLAW to SCT.

During the summer of 1986, we were able to persuade a majority of the Unsecured Creditors' Committee to refuse the SCT offer, and to support our request for a six month extension in Bankruptcy Court protection.

In late August 1986, the Bankruptcy Court granted the six-month extension, effectively ending the hostile takeover bid.

We later discovered in our own investigation that officials of SCT had met, in advance of their hostile takeover move, with Justice Department officials, including James Stewart, then a Presidential Appointee, to discuss the planned hostile takeover of INSLAW. Meese, Jensen, and Stewart were all originally from Alameda County, California.

According to interviews with former SCT employees, Justice Department officials led SCT to believe that INSLAW's contract disputes would be resolved promptly once the hostile takeover bid succeeded and William Hamilton was removed as President.

One former SCT employee, Robert Radford, provided INSLAW with a sworn affidavit claiming that SCT had given him and other employees a script to use in disparaging INSLAW to its customers and prospects in state and local governments throughout the United States.

We also later discovered that prior to launching the hostile takeover bid, SCT President Michael Emmi flew to the Berkshire Mountains to discuss the planned takeover of INSLAW with someone from outside of SCT by the name of Allen. Allen and Company, Earl Brian's investment bankers, subsequent to this meeting, invested $5 million in SCT stock. Herbert A. Allen, Jr. reportedly owns a vacation home in the Williamstown, Massachusetts section of the Berkshire Mountains.

I. Deputy Attorney General Arnold Burns Then Takes Action to Force INSLAW to Concede to the Justice Department the Right to Expand the Use of the PROMIS Software

At almost the same time in late August 1986 when INSLAW defeated SCT's hostile takeover bid, Deputy Attorney General Arnold Burns wrote to INSLAW's litigation counsel, Leigh Ratiner of Dickstein, Shapiro and Morin.

Burns's letter offered an early and, by implication, favorable resolution of the contract disputes if only INSLAW would concede to the Justice Department the right to implement PROMIS without paying license fees to INSLAW.

According to a September 1989 staff report on the INSLAW matter by the Senate Permanent Investigations Subcommittee, Burns had a "social luncheon" with Leonard Garment on October 6, 1986 to complain about Ratiner's prosecution of INSLAW's lawsuit against the Justice Department. Garment is a senior partner at

Dickstein, Shapiro and Morin, and had served as defense counsel for Meese in the Jacob Stein investigation. Dickstein, Shapiro and Morin has never disclosed the Garment/Burns social luncheon to INSLAW.

The following week in October 1986, Garment and the other members of the Senior Policy Committee of the law firm met and agreed to ask Ratiner to leave the law firm where he had by then been a partner for 10 years.

In January 1987, with Ratiner no longer on the INSLAW case, Dickstein, Shapiro and Morin presented us with a written demand for authority to settle the lawsuit on terms nearly identical to those offered by Burns in his August 1986 letter to Ratiner. The Dickstein, Shapiro and Morin letter informed us that the law firm would seek leave of the Bankruptcy Court to withdraw as counsel unless we acceded to their demands.

Fortunately, we were able to find new trial counsel and litigate and win our case in 1987. The new co-counsel for our litigation were McDermott, Will and Emery and Kellogg, Williams and Lyons.

J. **<u>As INSLAW Wins Its Case, the Government Renews Its Attempt to Liquidate the Company and Tries to Give New Life to the Sham Contract Disputes.</u>**

The Bankruptcy Court issued its oral ruling in the Summer and Fall of 1987, including its findings about the covert and unlawful effort in 1985 to force INSLAW's liquidation.

In November 1987, following those rulings, the IRS argued unsuccessfully in the Bankruptcy Court for the liquidation of INSLAW. Apparently the government felt no embarrassment at attempting to do overtly in 1987 what the Bankruptcy Court earlier that year had condemned the government for having tried to do covertly in 1985.

In October 1987, the Justice Department contacted the Director of the Defense Contract Audit Agency (DCAA) to arrange a new audit of INSLAW's PROMIS Implementation Contract. The Justice Department's own auditors had already conducted seven separate audits of this contract, and had published seven audit reports.

Justice Department counsel subsequently stated on the record in U.S. District Court that the Justice Department intended to litigate the contract disputes, before the Department of Transportation Board of Contract Appeals, with the expectation

of clearing Jensen of wrongdoing in the INSLAW case.

During 1989, the Justice Department made repeated attempts to rent space in INSLAW's office building for the DCAA Auditors to use while conducting the eighth and entirely redundant government audit of INSLAW.

K. **INSLAW Asks the Justice Department to Seek the Appointment of an Independent Counsel**

In February 1988, we submitted a written complaint to the Criminal Division's Public Integrity Section about Meese, Jensen and Brian. We asked for the appointment of an Independent Counsel under the Ethics in Government Act.

That same month, we sought an opportunity, through our litigation counsel, for a meeting to discuss our complaint with a representative of the Public Integrity Section. We were refused, even though our written complaint was accompanied by the several hundred findings of fact of a federal bankruptcy judge, and fifteen pages of additional facts about the broader scope of the malfeasance.

In May 1988, the Justice Department issued a press release announcing that it had cleared Attorney General Meese of any wrongdoing in the INSLAW matter.

In December 1989, INSLAW filed a Petition for a Writ of Mandamus seeking to compel Attorney General Thornburgh and the U.S. Department of Justice to conduct a fair and thorough investigation of our complaint. We noted in our Petition that the Justice Department had failed to interview 29 of the 30 witnesses whom INSLAW had identified, and that many of the witnesses are former or current Justice Department officials. The U.S. District Court denied INSLAW's Petition in October 1990 on grounds of legal standing, but noted that the seemingly cursory nature of the Justice Department investigation might indicate a conflict of interest.

L. **The Government Attempts to Block INSLAW's Reorganization Plan**

IBM and INSLAW are business partners in marketing computer-based solutions to state and local courts and justice agencies, and to insurance company claims offices.

IBM offered to loan INSLAW $2.5 million if INSLAW could obtain Bankruptcy Court confirmation of a Plan of Reorganization by the end of 1988.

The government strenuously objected to INSLAW's Plan of Reorganization

because of the Company's tax arrearage. The Bankruptcy Court,noting that the government owes INSLAW in court awards of damages and legal fees more than 10 times what INSLAW owes the IRS, overruled the government's objections, and confirmed the Plan by the end of 1988.

The government then moved again in Bankruptcy Court, attempting this time to block the disbursement of the IBM financing. If successful, the government would have prevented the consummation of INSLAW's Plan of Reorganization. Once again, the Court rejected the government's effort to destroy INSLAW.

M. <u>In 1990, the Justice Department Renews Its Effort to Acquire PROMIS Through Trickery, Fraud and Deceit</u>

In January 1990, the Justice Department issued a Request for Proposals for the development of a new case management software system to replace INSLAW's PROMIS in the Lands and Natural Resources Division.

The government stated in the solicitation that the government wished to own exclusive title to the new software product, and that it might later implement the software on computers acquired under Project EAGLE.

The most critical success factor for the winning vendor, according to the solicitation, was recent and extensive working experience with the PROMIS source code. The government falsely stated that it had the right to give the winning vendor access to the PROMIS source code and documentation.

The software product specifications in the solicitation almost perfectly matched the features and functions of the current version of PROMIS.

INSLAW filed an agency bid protest against this solicitation. The Justice Department subsequently cancelled the procurement.

N. <u>Evidence Rapidly Accumulates that the Justice Department Piracy of the PROMIS Software Is Much Greater Than Has Been Previously Admitted in Court</u>.

In September 1990, INSLAW sought authority from the U.S. District Court to conduct limited discovery to determine the validity of claims by multiple sources that the Justice Department piracy of the PROMIS software is much more widespread than the Justice Department has acknowledged in Bankruptcy Court.

One source, a recently retired senior level Justice Department official, claims that the Office of the Attorney General of the United States issued orders in the

summer of 1988 to implement PROMIS in offices other than U.S. Attorneys Offices. The Bankruptcy Court's Permanent Injunction against such proliferation was already in full force by then.

As was sadly predictable, the Justice Department, which will not conduct a fair and thorough investigation of its own and which refuses to seek the appointment of an Independent Counsel, is attempting to prevent INSLAW from conducting the limited discovery necessary to prove or disprove the allegations of much broader Justice Department piracy of INSLAW's PROMIS software.

Opening Statement, Testimony by George Francis Bason, Jr.
Before the Committee on the Judiciary, House of Representatives

I am happy to respond to your request to give testimony that may help the Committee in its investigation. I understand that you would like me to make a brief statement concerning my personal experiences as a candidate for judicial reappointment, and then to respond to your questions concerning Inslaw and the Justice Department and concerning my recommendations for legislation to improve the appointment process.

I have come to believe my non-reappointment was the result of improper influence from within the Justice Department which the current appointment process failed to prevent.

I was the sole United States Bankruptcy Judge for the District of Columbia from February 8, 1984 through February 7, 1988. As such, I was the trial judge who personally heard the testimony and observed the witnesses in the matter of Inslaw v. U.S.Department of Justice. The judicial opinions that I rendered reflected my sense of moral outrage that, as the evidence showed and as I held, the Justice Department stole Inslaw's valuable property and tried to drive Inslaw out of business.

Those opinions were upheld on appeal by Senior U.S. District Judge William Bryant, in a memorandum that noted my "attention to detail" and "mastery of the evidence."

Very soon after I rendered those opinions my application for reappointment as bankruptcy judge was turned down. One of the Justice Department attorneys who had argued the Inslaw case before me was appointed in my stead. Although over 90% of the incumbent bankruptcy judges who sought reappointment were in fact reappointed, I was not among them.

GAO Reports

My application for reappointment went through the statutory three-step process for selection of bankruptcy judges.

- First, a four-member Merit Selection Panel (including one judge) screened all of the candidates. That Panel passed on four names to the Judicial Council. My successor's name was ranked first and my own name was further down.

- Second, the Judicial Council passed on to the Court of Appeals, without any independent recommendation, the names of three of the four candidates, including mine.

- Third, the judges of the Court of Appeals made the final selection.

Congress designed this procedure in an attempt to insure that bankruptcy judges would be selected on the basis of merit.

However in this case several circumstances indicate that the decision of the Merit Selection Panel must have been the result of some improper interference with its processes.

- In order to forestall discrimination against incumbents, Congress included a specific provision in the statute requiring that incumbent bankruptcy judges seeking reappointment be given "equal consideration to that given all other" candidates. Under the "equal consideration" mandate, my qualifications were so far superior to my successor's that on the merits no rational person could have chosen him over me.

Merit must of course be judged both from the written record - my resume and opinions - and from my reputation amongst the judges and bankruptcy practitioners who knew me. My resume speaks for

GAO Reports

itself and my opinions have been cited often and reversed seldom. My successor had scant bankruptcy experience and of course no opinions. My resume, with excerpts from numerous letters attesting to my reputation amongst practitioners, is attached as Exhibit A.

- Despite a regulation requiring that at least one member of the Panel be "an attorney with a predominantly bankruptcy practice in the District of Columbia," so far as I know no member of the Panel had ever appeared, even once, in the Bankruptcy Court for the District of Columbia.

Hence, no member of the Panel had first-hand knowledge of my capabilities as a judge.

- The Panel failed to interview District Court Chief Judge Aubrey Robinson, who exercised general supervisory authority over administrative aspects of the Bankruptcy Court and whose name I had specifically suggested to the Panel.

Every year during my tenure Chief Judge Robinson, in his annual reports to the D. C. Circuit Judicial Conference, praised my performance as Bankruptcy Judge. For example, in May 1986 he noted that, despite "increased case load . . . the Bankruptcy Court is basically current" because of my "extraordinary efforts, perseverance and hard work." Again in May 1987 he stated: "We are all indebted to Judge Bason, for his untiring efforts have produced adjudications of the highest quality."

- At no time did the Panel or any member of the Panel provide any notice to me that it had received any adverse comments about me from any source, or that it had any concerns about any aspect of my performance as a judge.

GAO Reports

Therefore, I never had any opportunity to respond to any such comments or concerns.

- I have repeatedly sought and have repeatedly been denied any official explanation of why the decision not to reappoint me was made. The only explanation ever offered to me, even informally, related to inefficiency in the Bankruptcy Clerk's office and obviously lacked any basis in fact.
    - The running of the Clerk's office was not my direct responsibility and was not among the statutory criteria that the Merit Selection Panel was to apply.
    - The person that I hired to clean up the previous problems in the Clerk's office is still there.
    - The Merit Selection Panel never interviewed the new Clerk or anyone else in the Clerk's Office.
    - During all my years on the bench, no one had ever suggested to me that there was any problem with my performance in regard to the Clerk's Office.
- Appeals Court Chief Judge Patricia Wald's words to me when she told me I was not to be reappointed were, "Life is unfair." The strong implication was that she knew the decision was not justified on the merits. I was shocked; I could not believe that such a decision was possible. Others shared that reaction.

GAO Reports

A number of the District Judge members of the Judicial Council, when they received the Merit Selection Panel's report, were so dismayed at the Panel's failure to recommend my reappointment that they caucused to see if there was anything they could do to reverse the process. They concluded that unfortunately there was no time to do so.

When the Chairmen of the Bankruptcy Committees of the two largest Bar Associations in the District of Columbia found out about the decision not to reappoint me, they too looked for ways to reverse that decision and they too concluded that unfortunately it was by then too late.

For a long time I resisted the obvious explanation for the bizarre decision by the Merit Selection Panel which led to my non-reappointment: that the process had been manipulated. But new information has come to my attention since I left the bench that leaves no doubt in my mind that the Justice Department itself did manipulate the process.

- First, I have learned that, in late March 1987, the following occurred. I expressed "concern" about "Justice Department people . . . talking to" an important witness "outside the presence of [Inslaw's] counsel about the subject matter of his testimony, and without notice." Then it developed that the witness had recanted his testimony that was favorable to Inslaw immediately after being contacted by a former Justice Department colleague. And then one of the Justice Department's lawyers was heard saying to another that we've got to get rid of this judge.

- Second, in about May 1988, a news reporter who told me he had excellent contacts and sources of information within the Justice

Department, suggested that the Justice Department could have procured my removal by the following means:

> The District Judge Chairperson of the Merit Selection Panel could have been approached privately and informally by one of her old and trusted friends from her days in the Justice Department. He could have told her that I was mentally unbalanced, as evidenced by my unusually forceful "anti-Government" opinions. Her persuasive powers, coupled with the fact that other members of the Panel or their law firms might appear before her as litigating attorneys, could cause them to vote with her.

Later that same reporter telephoned and confirmed that in fact a high Justice Department official had boasted to him that Bason's removal was because of his Inslaw rulings.

If Justice Department officials were willing to steal from and try to liquidate Inslaw, and then to lie about it under oath, there is every reason to believe they would not hesitate to do whatever was necessary and possible to remove from office the Judge who first exposed their wrongdoing and who would otherwise then be in a position to make further adverse rulings.

I can no longer escape the conclusion that most knowledgeable lawyers in Washington reached long ago. I would not have lost my job as bankruptcy judge but for my rulings in the Inslaw case.

I have been told by legal search firms that I am now considered to be too controversial a figure to be employable by any of the large law firms. I am paying the full price for doing my duty to render equal justice without regard to rank or position. As a Judge I could not and would not do otherwise.

The independence of the judiciary and the separation of powers are among the glories of our form of Government. It strikes at the heart of those principles for the Justice Department to retaliate against a judge by causing his removal. Such retaliation is the mark of a police state, not of democratic America.

Thank you for your attention.

* * * * *

George Francis Bason, Jr.
1025 Thomas Jefferson Street, N.W.
Suite 500 East
Washington, D.C. 20016
(202) 337-4224
Telecopier: (202) 342-5446

BIOGRAPHICAL DATA

Experience

Feb. 1984- Feb. 1988	Judge, United States Bankruptcy Court, Washington, D.C.	Major cases include United Press International, Inc.; Auto-Train Corporation; Inslaw, Inc. v. U.S. Seventy published opinions (see attached list). Co-chair, 1985-86, Committee on U.S. Bankruptcy Courts, National Conference of Special Court Judges, American Bar Association.
July 1972-Jan. 1984	Solo practice, George F. Bason, Jr. (P.C. 1978-1984), Washington, D.C.	Civil practice, specializing in bankruptcy and reorganization law. Trustee for Wage Earner Plans in the District of Columbia, 1972-75. Chair, D.C. Bar Committee on Bankruptcy and Reorganizations, 1974-75.
Sept. 1966-June 1972	Associate (1969-72) and Assistant (1966-69) Professor of Law, The American University, Washington College of Law, Washington, D.C.	Co-founder and Faculty Advisor, A.U. Legal Aid Services (recipient of four A.B.A. awards). Co-founder and first chairman of the Board, D.C. Law Students in Court. Faculty Coordinator, A.U. Clinical Legal Education Program. Founder and first Director, A.U. Criminal Litigation Clinic. Awards for outstanding service to law school, legal aid, and clinical legal education.
Jan. 1962-Aug. 1966	Associate, Martin, Kunen & Whitfield, Washington, D.C.	Corporate practice, with particular emphasis upon banking and commercial law, bankruptcy, and transactions before administrative agencies.
Feb. 1958-Dec. 1961	Associate, Royall, Koegel & Wells (now Rogers & Wells), Washington, D.C.	Corporate practice, with particular emphasis upon antitrust law, litigation, and transactions before administrative agencies and executive departments.
Aug. 1956-Jan. 1958	Associate, Chas. G. Rose, Jr., Fayetteville, N.C.	Civil practice, with particular emphasis upon real estate transactions.

Published Materials include:

Author, *Debtor and Creditor Relations*, 3 vols., in *West's Legal Forms 2d* (1984).

Co-Author, *Collier on Bankruptcy*, Vols. 2 and 10 (1975 rev.)

"To Enforce These Rights," 1973 *Wisc. L. Rev.* 1085 (1974) (received first prize, American Bar Essay Contest on Constitutional Law)

Education

Legal	Harvard Law School, Cambridge, Mass., J.D., *cum laude*, 1956	**Standing:** 73/452 (within top 17 percent) **Honors:** Senior Director, Harvard Legal Aid Bureau
College	Davidson College, Davidson, N.C., A.B., *cum laude*, 1953	**Standing:** Salutatorian (top 2 percent) **Honors:** Phi Beta Kappa; honors course in English Constitutional History
Preparatory	The Hill School, Pottstown, Penna.	**Standing:** Within top 5 percent **Honors:** Cum Laude Society; honors course

Admitted to Practice Before:

Supreme Court of the United States; United States Court of Appeals for the District of Columbia Circuit; District of Columbia Court of Appeals; Supreme Court of North Carolina.

Member:

American Bankruptcy Institute; American Bar Association; Bar Association of the District of Columbia; District of Columbia Bar; National Conference of Bankruptcy Judges.

Personal Data

Age 57. Married to Sheilah M.W. Bason. Two sons: Neil (26) and Iain (24). Excellent health.

George Francis Bason, Jr.
3610 Quebec Street, N.W.
Washington, D.C. 20016
(202) 966-7335

A. **Major Cases**

1. In re Hillandale Development Corp. ($40 million, Clint-Murchison-backed development on the Archbold Mansion site).

2. In re United Press International, Inc. (UPI successfully reorganized through a $40 million sale in little more than a year; more than 5,000 creditors).

3. In re Auto-Train Corp. (first railroad reorganization case under new Bankruptcy Code; more than 20,000 creditors).

4. In re Inslaw, Inc.; Inslaw Inc. v. United States Department of Justice (multi-million dollar claim by debtor against Department of Justice ("DOJ"), resulting in recently printed findings and conclusions, holding that DOJ converted Inslaw's property by trickery, fraud, and deceit and tried to force Inslaw into Chapter 7 liquidation bankruptcy).

B. **Published Opinions**

1. In re Inslaw, Inc. (Inslaw, Inc. v. United States), 88 Bankr. 484 (Bankr. D.C. 1988).
2. In re Tariff Resources, Inc., 83 Bankr. 176 (Bankr. D.C. 1988).
3. In re Inslaw, Inc. (Inslaw, Inc. v. United States), 83 Bankr. 89 (Bankr. D.C. 1988).
4. In re Shields, 82 Bankr. 171 (Bankr. D.C. 1988).
5. In re Hawkins, 81 Bankr. 183 (Bankr. D.C. 1988).
6. In re Cafe Partners/Washington 1983, 81 Bankr. 175, 17 B.C.D. 320 (Bankr. D.C. 1988).
7. In re Mitchell, 81 Bankr. 171 (Bankr. D.C. 1988).
8. In re Inslaw, Inc., 81 Bankr. 169 (Bankr. D.C. 1988).
9. In re Jones, 80 Bankr. 597, 16 B.C.D. 1256 (Bankr. D.C. 1988).
10. In re Inslaw, Inc. (Inslaw, Inc. v. United States), 76 Bankr. 224 (Bankr. D.C. 1987).
11. In re White, 73 Bankr. 983 (Bankr. D.C. 1987).
12. In re Minick, 63 Bankr. 440, 14 B.C.D. 921, Bankr. L. Rep. p. 71,417 (Bankr. D.C. 1986).

13. In re Auto-Pak, Inc., 63 Bankr. 321 (Bankr. D.C. 1986).

14. In re Jephunneh Lawrence & Assocs. Chtd., 63 Bankr. 318, 15 C.B.C.2d 742 (Bankr. D.C. 1986).

15. In re Leonard, 63 Bankr. 261 (Bankr. D.C. 1986).

16. In re 12th & N Joint Venture, 63 Bankr. 36, 15 C.B.C.2d 466 (Bankr. D.C. 1986).

17. In re United Press International, Inc., 60 Bankr. 265, 14 B.C.D. 425, Bankr. L. Rep. p. 71,135 (Bankr. D.C. 1986).

18. In re L.A. Clarke & Son, Inc. 59 Bankr. 856 (Bankr. D.C. 1986).

19. In re J.J. Mellon's, Inc., 59 Bankr. 598 (Bankr. D.C. 1986).

20. In re Myers, 60 Bankr. 108 (Bankr. D.C. 1986).

21. In re Colbert, 57 Bankr. 600 (Bankr. D.C. 1986).

22. In re Auto-Train Corp., 57 Bankr. 566, Bankr. L. Rep. p. 71,017 (Bankr. D.C. 1986).

23. In re Community Churches of America, 57 Bankr. 562 (Bankr. D.C. 1986).

24. In re Yaffe, 58 Bankr. 26 (Bankr. D.C. 1986).

25. In re The President of the United States, 88 Bankr. 1 (Bankr. D.C. 1985).

26. In re Villa Roel, Inc., 57 Bankr. 879, 14 C.B.C.2d 523 (Bankr. D.C. 1985).

27. In re Fields, 55 Bankr. 294 (Bankr. D.C. 1985).

28. In re Auto-Pak, Inc., 55 Bankr. 407 (Bankr. D.C. 1985).

29. In re Inslaw, Inc., 55 Bankr. 502, 13 C.B.C.2d 1131 (Bankr. D.C. 1985).

30. In re Leonard, 55 Bankr. 106, 13 C.B.C.2d 1189, 13 B.C.D. 1003, Bankr. L. Rep. p. 70,867 (Bankr. D.C. 1985).

31. In re Kragh, 55 Bankr. 88 (Bankr. D.C. 1985).

32. In re Wing, 55 Bankr. 91 (Bankr. D.C. 1985).

33. In re Gardner, 55 Bankr. 89 (Bankr. D.C. 1985).

34. In re J.J. Mellon's, Inc., 57 Bankr. 437, 14 B.C.D. 35 (Bankr. D.C. 1985).

35. In re Blackman, 55 Bankr. 437, 13 B.C.D. 1013, Bankr. L. Rep. p. 70,866 (Bankr. D.C. 1985).

36. In re Auto-Pak, Inc., 55 Bankr. 406 (Bankr. D.C. 1985).

37. In re Auto-Train Corp., 55 Bankr. 69 (Bankr. D.C. 1985).

38. In re Villa Roel, Inc., 57 Bankr. 835 (Bankr. D.C. 1985).

39. In re United Press International, Inc., 55 Bankr. 63 (Bankr. D.C. 1985).

40. In re Miller, 55 Bankr. 49 (Bankr. D.C. 1985).

41. In re Auto-Pak, Inc., 55 Bankr. 403 (Bankr. D.C. 1985).

42. In re Leonard, 51 Bankr. 53 (Bankr. D.C. 1985).

43. In re Rea, 57 Bankr. 834 (Bankr. D.C. 1985).

44. In re La Boucherie Bernard, Ltd., 55 Bankr. 23 (Bankr. D.C. 1985).

45. In re La Boucherie Bernard, Ltd., 55 Bankr. 22 (Bankr. D.C. 1985).

46. In re B & F Associates, Inc., 55 Bankr. 19 (Bankr. D.C. 1985).

47. In re Ted Liu's Szechuan Garden, Inc., 55 Bankr. 8 (Bankr. D.C. 1985).

48. In re D.C. Diamond Head, Inc., 51 Bankr. 309 (Bankr. D.C. 1985).

49. In re Inslaw, Inc., 51 Bankr. 298 (Bankr. D.C. 1985).

50. In re L.A. Clarke & Son, Inc. 51 Bankr. 31, 13 B.C.D. 452 (Bankr. D.C. 1985).

51. In re Carey, 51 Bankr. 294 (Bankr. D.C. 1985).

52. In re Auto-Pak, Inc., 52 Bankr. 3 (Bankr. D.C. 1985).

53. In re Sator, 51 Bankr. 30 (Bankr. D.C. 1985).

54. In re Wright, 51 Bankr. 669 (Bankr. D.C. 1985).

55. In re Chapman, 51 Bankr. 663 (Bankr. D.C. 1985).

56. In re Shorts, 63 Bankr. 2, 14 B.C.D. 920 (Bankr. D.C. 1985).

57. In re Brown, 51 Bankr. 284 (Bankr. D.C. 1985).

58. In re Robertson, 51 Bankr. 20 (Bankr. D.C. 1984).

59. In re Smith, 51 Bankr. 273 (Bankr. D.C. 1984).

60. In re Sampson, 51 Bankr. 13 (Bankr. D.C. 1984).

61. In re Burruss, 57 Bankr. 415 (Bankr. D.C. 1984).

62. In re North Duke Ltd. Partnership, 57 Bankr. 412 (Bankr. D.C. 1984).

63. In re Page Associates, 51 Bankr. 11 (Bankr. D.C. 1984).

64. In re Perkins, 51 Bankr. 272 (Bankr. D.C. 1984).

65. In re Butler, 51 Bankr. 261 (Bankr. D.C. 1984).

66. In re Washington Communications Group, Inc., 41 Bankr. 317 (Bankr. D.C. 1984).

67. In re Ricks, 40 Bankr. 507, 11 B.C.D. 1341, Bankr. L. Rep. p. 69,945 (Bankr. D.C. 1984).

68. In re Whisenton, 40 Bankr. 468 (Bankr. D.C. 1984).

69. In re Jackson, 42 Bankr. 76 (Bankr. D.C. 1984).

70. In re VVF Communications Corp., 41 Bankr. 546 (Bankr. D.C. 1984).

71. In re Hagel Partnership, Ltd., 40 Bankr. 821 (Bankr. D.C. 1984).

72. In re Kent, 40 Bankr. 467 (Bankr. D.C. 1984).

From letters to The Honorable Patricia M. Wald, Chief Judge, United States Court of Appeals for the District of Columbia Circuit:

"Judge Bason is a man of outstanding legal ability and has performed his duties as Bankruptcy Judge with distinction. He has displayed the ability to develop, in his scholarly and well written legal opinions, the rationale underlying his decisions in a manner which enhances the growing body of law with which he has been concerned.

"On the basis of my personal knowledge of Judge Bason, as well as my association with fellow attorneys who have had an opportunity to practice before him, I know he enjoys an excellent reputation among the members of the bar. Judge Bason has evidenced a sense of fairness and a knowledge of human nature which contributes immeasurably to the general belief that he possesses a high degree of judicial temperament."

–Lee W. Cowan, Esq.,
January 14, 1988

"This firm served as counsel to the Wire Service Guild in the Chapter 11 proceeding of United Press International, Inc. which was pending before Judge Bason. . . .

"We have appeared before Bankruptcy Judges in many districts and have found none of any higher caliber than Judge Bason. The UPI Bankruptcy proceedings were the most complicated, adversarial and emotional with which I have been associated. The demands upon Judge Bason's time, intellect, patience and sensitivity were incredible. . . .

"Throughout the proceedings, Judge Bason demonstrated a thoughtful, practical and informed approach to these proceedings. I know that all of the attorneys involved in the UPI proceeding shared this view of the Judge, whether he ruled in their favor or against them. Statements were made at the confirmation hearings by most counsel, to the effect that UPI could have never come through its Bankruptcy without the guidance and governance of Judge Bason. I wholeheartedly share that view."

–Daniel M. Stolz, Esq.,
Lehman & Wasserman,
January 22, 1988

"I have been acquainted with Judge Bason since approximately 1972. . . .

"[Judge Bason] is extremely well-versed in bankruptcy law, practice and procedure, and is consistently effective in dealing with the most complex legal issues.

"In addition, Judge Bason acted as Chairman of several local bankruptcy committees, of which I was a member, and demonstrated vast knowledge of bankruptcy legislation and rule-making procedures. He has prepared several bankruptcy practice manuals and form books.

"As the Bankruptcy Judge, he is patient, conscientious, highly-motivated and extremely competent. He has otherwise demonstrated exemplary legal ability and fundamental human decency. His performance in office has been commensurate with his outstanding qualifications.

"In one highly innovative and unique mechanism, . . . he has successfully resolved a nationwide problem. . . . I have discussed this innovative mechanism at national conferences with other Chapter 13 trustees, judges and practitioners . . . and, at their request, have sent [copies of Judge Bason's solution] all over the country."

–Cynthia A. Niklas, Esq.,
Chapter 13 Trustee for the District of Columbia,
Pitts, Wike & Niklas,
January 21, 1988

"In my cases before the Bankruptcy Court for the District of Columbia, I have found the Court to be fair to all parties, temperate in judgment and respectful to counsels. Although [Judge Bason's] rulings have not always favored my clients, they have always been based in law and on the Code."

–Joseph S. Friedman, Esq.,
January 21, 1988

"We have always found [Judge Bason] to provide the utmost respect and courtesy to all parties and attorneys, making certain that all parties have an opportunity to fully set forth their position. We have observed and it has been our experience that Judge Bason provides detailed findings and supporting legal reference to his rulings. In our judgment his rulings have been fair and well reasoned. Such admirable qualities, we believe, demonstrate the soundest of attributes for a judge.

–Harris S. Ammerman, Esq.
and Joseph M. Goldberg, Esq.,
Ammerman & Goldberg,
January 21, 1988

Continued

From Letters to The Honorable Norma Holloway Johnson, Chair, Panel for the Selection of Bankruptcy Judge:

"I have known [George Bason] for at least ten years. I knew him as an excellent practitioner who brought real creativity to the cases that he handled. His background in academia helps to explain an intellectual bent and a willingness to approach a problem with real depth. Judge Bason has carried these skills to the bench and has often played the role of a patient teacher trying to get some difficult concepts through some unreceptive adult minds. . . . [Judge Bason] is a strong solid judge who is willing to sit late and work around the clock in order to keep his calendar current. His temperament is remarkably polite and he is a distinguished student of the bankruptcy law."

–Paul D. Pearlstein, Esq.,
Paul D. Pearlstein & Associates,
November 20, 1987

"I have always found [Judge Bason] to display that special judicial temperament which is essential [to a] bankruptcy judge. In my personal judgment, his rulings have been fair, even-handed, impartial and tempered with humility. He is certainly hard working and scholarly, and he has demonstrated a quality in his work which is to be highly commended.

–Harris S. Ammerman, Esq.,
Ammerman & Goldberg,
November 30, 1987

"Having appeared before Judge Bason on at least a hundred bankruptcy matters during the last few years, I believe I have a sufficient factual foundation on which to evaluate his ability as a jurist. My views are based not only on those cases in which I have appeared, but also from observing numerous other cases and reading many of his published opinions.

"In my view, Judge Bason possesses all of the qualities that comprise an outstanding jurist. He makes good decisions based upon precedent, sound legal reasoning, and common sense. He treats parties and counsel in his courtroom with patience, respect, and understanding. . . .

"I am also familiar with Judge Bason's reputation in the legal community. . . . Judge Bason is highly regarded. For example, at the second annual Mid-Atlantic Institute on Bankruptcy and Reorganization Practice, which I recently attended, several of the panel members, including four bankruptcy judges, discussed opinions by Judge Bason in most favorable terms. They further indicated that these opinions would be relied upon as sound precedent in the future."

–Nelson J. Kline, Esq.,
Kline & Joseph,
November 23, 1987

From Letters to George Francis Bason, Jr.:

"My colleague, Mary Dowd, and I . . . have a high regard for your performance on the bench. . . . We have appeared before many bankruptcy judges in different jurisdictions and in our opinion, you were one of the better judges in terms of substance, procedure, and temperament."

William B. Sullivan, Esq.,
Arent, Fox, Kintner, Plotkin & Kahn,
February 29, 1988

"I would like to take this opportunity to express my profound respect for you as a conscientious and fair-minded jurist."

–Kevin R. McCarthy, Esq.,
Lepon, McCarthy & Jutkowitz,
February 5, 1988

"[Your departure] is a loss to the bench and the bar."

–Lewis I. Winarsky, Esq.,
Office of the General Counsel, Washington Gas,
January 15, 1988

"I found the Bankruptcy Court [to be] humane, sagacious, and kind yet firm under your guidance. Your approach was so fair, so positive yet professional, I always felt a sense of satisfaction."

–Catharyn A. Butler-Turner, Esq.,
February 2, 1988

"For a brief period of time, I had the distinct honor of practicing with some regularity before you. . . . Judges and attorneys are too often jaded, and lose a certain perspective and empathy for the small, inefficient, and oft-time hapless citizens who make up so large a proportion of the debtors who resort to the protection of the Bankruptcy Court. The interest you took in each individual case that came before you was and remains an inspiration to me, which, in no small measure, plays a part in the way I attempt to conduct my own practice."

–Jeffrey P. Russell, Esq.,
January 7, 1988

GAO Report

STATEMENT BY GENERAL COUNSEL TO THE CLERK
OF THE HOUSE OF REPRESENTATIVES
REGARDING THE ATTORNEY GENERAL'S WITHHOLDING
OF DOCUMENTS FROM THE JUDICIARY COMMITTEE

Mr. Chairman, we have been asked to analyze the Attorney General's decision to withhold documents relating to the INSLAW matter from this Committee. Specifically, the Attorney General has written the Committee that he is withholding several hundred documents, citing as his main assertion that the pendency of civil litigation relieves the Department from its obligation to provide documents called for by this Committee, even if those documents may reveal governmental waste, fraud, or abuse. On September 26, 1990, Attorney General Thornburgh responded to a committee demand for documents with this statement:

> [My "pledge to cooperate fully in the Committee's investigation"], however, should not be construed in any way that would be inconsistent with my responsibilities as the Attorney General, the nation's chief litigator. Those responsibilities include the obligation to protect documents compiled by attorneys in connection with pending litigation, which are not in the public domain and could be described as "litigation strategy" or "work product.

The Attorney General's claimed basis for withholding of key documents represents an attempt by him to create an exception for himself and functionaries within his Department to the constitutional principle that all executive officials, high or low, exercise their authority pursuant to law and that all such public officials are accountable to legislative oversight aimed at ferreting out waste, fraud, and abuse. Although cloaked in doctrinal terms, the Attorney General's assertion of immunity from oversight represents an attempt to free the Justice Department from the time-honored system of checks and balances.

GAO Reports

We have analyzed the Attorney General's position in two steps. First, we review the history of precedents regarding oversight of the Justice Department. These show the Attorney General is obliged to submit to oversight, regardless of whether litigation is pending, so that Congress is not delayed for years in investigating misfeasance and/or malfeasance in the Justice Department and elsewhere. Second, we review the particular doctrines put forward by the Attorney General as they bear on these documents, and conclude that the asserted reasons for withholding these documents from the Committee are without merit.

I. THE PRECEDENTS SHOW THE ATTORNEY GENERAL IS OBLIGED TO SUBMIT TO OVERSIGHT, REGARDLESS OF WHETHER LITIGATION IS PENDING

The precedents regarding oversight of the Justice Department, and particularly oversight of actions by the Attorney General, include a number of important Congressional investigations, such as Teapot Dome, Watergate, the Anne Gorsuch/EPA investigation of the early 1980s, and Iran-contra. While the Inslaw matter has not yet attained the notoriety that these Justice Department scandals came to have, it raises again the basic question of fraud or abuse within the Justice Department, and a Congressional investigation in which the Attorney General resists oversight in a way that may conceal fraud or abuse within the Department. Our review of these precedents shows that when the Congress is investigating waste, fraud, and abuse, as it is in the INSLAW matter, the Attorney General has been obliged to submit to oversight, regardless of whether litigation is pending.

GAO Reports

Teapot Dome

During Teapot Dome -- the 1920s scandal regarding oil company payoffs to the Harding Administration -- Attorney General Daugherty's failures to prosecute became a major concern of the Congressional oversight investigation.[1] When Congressional committees attempting to investigate came up against refusals to provide information, the issue went to the Supreme Court and provided the Court with the opportunity to issue one of its classic decisions describing the constitutional basis and reach of congressional oversight. In McGrain v. Daugherty, 273 U.S. 135, 151 (1927), the Supreme Court focused specifically on Congress's authority to study "charges of misfeasance and nonfeasance in the Department of Justice." The Supreme Court noted with approval that "the subject to be investigated" by the Congressional committee "was the administration of the Department of Justice -- whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes. . . ." Id. at 177. In its decision, the Supreme Court sustained the contempt arrest of the Attorney General's brother for withholding information from Congress, since Congress "would be materially aided by the information which the investigation was calculated to elicit." Id. Thus, the Supreme Court itself has

---

1 Diner, Hasia, "Teapot Dome, 1924," in Congress Investigates: 1792-1974, 199, 211 (A. Schlesinger & R. Bruns eds. 1975).

declared null any attempted pretensions that oversight could be barred regarding "whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings." Claims by the Attorney General that he can block such oversight simply attempt to assert prerogatives of being above the law which have been rejected by the Supreme Court.

In another Teapot Dome case that reached the Supreme Court, Sinclair v. United States, 279 U.S. 263 (1929), a different witness at the Congressional hearings refused to provide answers, and was prosecuted for contempt of Congress. The witness had noted that a lawsuit had been commenced between the government and the Mammoth Oil Company, and declared, "I shall reserve any evidence I may be able to give for those courts. . . and shall respectfully decline to answer any questions propounded by your committee." Id. at 290. The Supreme Court upheld the witness's conviction for contempt of Congress. The Court considered and rejected in unequivocal terms the witness's contention that the pendency of lawsuits gave an excuse for withholding information. Neither the laws directing that such lawsuits be instituted, nor the lawsuits themselves, "operated to divest the Senate, or the committee, of power further to investigate the actual administration of the land laws." Id. at 295.

The Court further explained: "It may be conceded that Congress is without authority to compel disclosures for the purpose of aiding the prosecution of pending suits; but the authority of that body, directly or through its committees, to require pertinent

declared null any attempted pretensions that oversight could be barred regarding "whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings." Claims by the Attorney General that he can block such oversight simply attempt to assert prerogatives of being above the law which have been rejected by the Supreme Court.

In another Teapot Dome case that reached the Supreme Court, Sinclair v. United States, 279 U.S. 263 (1929), a different witness at the Congressional hearings refused to provide answers, and was prosecuted for contempt of Congress. The witness had noted that a lawsuit had been commenced between the government and the Mammoth Oil Company, and declared, "I shall reserve any evidence I may be able to give for those courts. . . and shall respectfully decline to answer any questions propounded by your committee." Id. at 290. The Supreme Court upheld the witness's conviction for contempt of Congress. The Court considered and rejected in unequivocal terms the witness's contention that the pendency of lawsuits gave an excuse for withholding information. Neither the laws directing that such lawsuits be instituted, nor the lawsuits themselves, "operated to divest the Senate, or the committee, of power further to investigate the actual administration of the land laws." Id. at 295.

The Court further explained: "It may be conceded that Congress is without authority to compel disclosures for the purpose of aiding the prosecution of pending suits; but the authority of that body, directly or through its committees, to require pertinent

disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits." Id. at 295. In other words, those having evidence in their possession -- like the Attorney General -- cannot lawfully assert that because civil lawsuits are pending involving the government, "the authority of [the Congress], directly or through its committees, to require pertinent disclosures" is somehow "abridged." On the contrary, the Supreme Court vindicates Congress's authority to obtain such information, and denounces those who would withhold the information on the asserted ground of pending civil proceedings, even to the point of upholding the conviction and sentencing of those who attempt such withholding.

An appropriate note to the Teapot Dome period is that despite the attempts at withholding, the Congressional investigations uncovered sufficient evidence of "illegality, graft, and influence-peddling in the Justice Department"[2] for Attorney General Daugherty to resign.

Watergate

With the events of Watergate, we enter a period of history with which the current Chairman, and a number of members of the

---

[2] In 1920 and 1921, two committees investigated the notorious Palmer raids in which, under the direction of the Attorney General, hundreds of persons were illegally arrested, detained and deported. The committees explored at length the specific abuses by the Department -- not closed matters, not statistical analysis, but concrete current abuses. Attorney General A. Mitchell Palmer on Charges Made Against Department of Justice by Louis F. Post and Others: Hearings Before the House Comm. on Rules, 66th Cong., 2d Sess. (1920); Charges of Illegal Practices of the Department of Justice: Hearings before a Subcomm. of the Sen. Comm. on the Judiciary, 66th Cong., 3d Sess. (1921).

GAO Reports

Committee, are familiar, and in which they played a significant part. As the Committee will recall, after the Watergate break-in and during the initial trial of the Watergate burglars, the House Banking and Currency Committee, chaired by Congressman Wright Patman, sought to conduct its own investigation. However, the White House under President Nixon used the pendency of the burglary prosecution as an excuse to block the Congressional investigation, which subsequently became part of the case for impeachment. The Judiciary Committee's subsequent Impeachment Report investigated and reached firm conclusions regarding this attempted stonewalling of a Congressional investigation.

As this Committee's Impeachment Report describes, in late 1972, "The President continued to stress the importance of cutting off the Patman hearings, which [John] Dean said was a forum over which they would have the least control." Impeachment of Richard M. Nixon, President of the United States, H.R. Rep. No. 1305, 93d Cong., 2d Sess. 63 (1974). Accordingly, "Dean took the necessary steps to implement the President's decision to stop the Patman hearings. [ ]. He contacted Assistant Attorney General Henry Petersen and urged Peterson to respond. . . . Petersen wrote to Chairman Patman and stated that the proposed hearings could prejudice the rights of the seven Watergate defendants. . . ." Id. at 65. The Impeachment Report concluded, "Unknown to the Congress, the efforts of the President, through Dean, his counsel" -- specifically, having the Assistant Attorney General tell Congress to hold off its investigation because of pending proceedings -- "had effectively cut off the investigation." Id.

Of course, the excuse of pending proceedings did not keep Congress out of investigating Watergate forever; it only delayed that Congressional investigation. By Spring of 1973, Congressional committees were no longer accepting the claim of parallel proceedings as an excuse for withholding evidence. Ultimately, Watergate and its cover-up, including the role of Attorney General Mitchell, the role of Attorney General Kleindienst in related matters, and the manipulation of the Justice Department and the FBI, were thoroughly probed by the Senate Watergate Committee and the House Judiciary Committee. This probing occurred at the same time as the pending investigations and proceedings of Special Prosecutors Cox and Jaworski. The Impeachment Report reflects the detailed investigation, not just of the use of the Justice Department to obstruct the Patman Committee inquiry, but of numerous other Justice Department activities, from Attorney General Kliendienst's role in the ITT case and Attorney General Mitchell's lying to a Congressional committee to the misuse of the FBI. Id. at 174-76 (Kleindienst), 152-56 (FBI).

Watergate was a dramatic instance where the House and Senate investigations had to overcome, not mere claims of pendency of civil proceedings -- let alone, as here, mere pendency of the appeal from such proceedings -- but claims of impact on soon-to-be-tried criminal cases. It was up to the committees to determine what evidence they needed, not to the Justice Department to measure whether to block those committees. History reflects that it was only because this Committee insisted on obtaining all the documents and other evidence from the Justice Department, despite any claims

about pending proceedings, that the depths of the scandal were ultimately plumbed.

It is an appropriate note to this period that two Attorneys General -- Kliendienst and Mitchell -- were eventually convicted of perjury before Congressional investigations.

<u>EPA/Anne Gorsuch</u>

Coming up to the 1980s, in 1982 the Congressional investigation of EPA's Superfund ran into Justice Department resistance based on claims very similar to those now being put forth on the INSLAW matter by Attorney General Thornburgh -- claims which were thoroughly overcome and discredited. Specifically, when House Committees investigated political interference with EPA's Superfund, the Attorney General responded that Administration documents would be withheld because they contained legal analysis and because of parallel pending proceedings. The Judiciary Committee ultimately investigated and revealed the impropriety of that withholding in its <u>Report of the Committee on the Judiciary on Investigation of the Role of the Department of Justice in the Withholding of EPA Documents from Congress in 1982-83</u> H.R. Rep. No. 435, 99th Cong., 1st Sess. (1985) ("<u>Justice Department Withholding Report</u>").

To quote the Attorney General's description of what was withheld during the EPA scandal, which sounds strikingly similar to Attorney General Thornburgh's current letter regarding INSLAW:

> The only documents which have been withheld are those which are sensitive memoranda or notes by EPA attorneys and investigators reflecting enforcement strategy, legal analysis, lists of potential witnesses, settlement considerations and similar

> materials the disclosure of which might adversely affect a pending enforcement action, overall enforcement policy, or the rights of individuals.

Letter from the Attorney General to Chairman Dingell, November 30, 1982, in Justice Department Withholding Report at 1169. There is little to choose between the Attorney General's claim then -- purporting to withhold documents on the basis that they contained "legal analysis," would reveal "enforcement strategy," and that they might "affect a pending enforcement action" -- and the current INSLAW claim, except that the claim of Attorney General Thornburgh, regarding a civil case which is now on appeal, presents an even weaker basis for withholding.

As you will recall, the House did not accept this basis for withholding, even though the Attorney General supported it with a claim of executive privilege by President Reagan. When the Administration continued to withhold the documents, the House of Representatives certified a contempt of Congress citation for Anne Gorsuch, the EPA Administrator. The Justice Department attempted to sustain its withholding of those documents by filing United States v. House of Representatives in the United States District Court for the District of Columbia. The office of General Counsel to the Clerk appeared on behalf of the House of Representatives in opposition to the Justice Department in the case. After we presented briefing and argument, the court rejected the Justice Department's position, confirmed the House's position and dismissed the Justice Department's suit. Id., 556 F. Supp. 150 (D.D.C. 1983). This cleared the way for a criminal prosecution of the administrator who had withheld documents at the Attorney General's

direction. At this stage, the resistance to oversight had been totally discredited, and the Administration released the documents.

There followed an investigation by the Judiciary Committee, in which the Justice Department, despite all those pending proceedings cited by the Attorney General in his withholding directions, produced its internal documents, whether they contained legal analysis, policy discussions, or anything else.

It is an appropriate note to this period that the Attorney General was required to apply for an Independent Counsel who investigated a conspiracy to obstruct at the Justice Department, and false testimony by departmental officials, involving the Justice Department's highest levels. The challenge to the constitutionality of this Independent Counsel, which the Justice Department joined in urging, reached the Supreme Court, which confirmed Congress's position and rejected the Justice Department's, in Morrison v. Olson, 487 U.S. 654 (1988).

Iran-Contra

Even more recently, in the late 1980s, an intense Congressional investigation focused, in part, on Attorney General Meese's conduct during the Iran-contra scandal. The House and Senate created their Iran-contra committees in January, 1987, on which, of course, both the former and current Chairmen of the Judiciary Committee served. The Iran-contra committees demanded the production of the Justice Department's files, to which Assistant Attorney General John Bolton responded, on behalf of Attorney General Meese, by attempting to withhold the documents on the claim that providing them would prejudice the pending or

anticipated litigation by the Independent Counsel. The Iran-Contra committees overruled that contention, required the furnishing of all Justice Department documents, and questioned all knowledgeable Justice Department officers up to, and including, Attorney General Meese.

One major aspect of the Iran-Contra Committees' investigation focused on the inadequacies of the so-called "Meese Inquiry," the team led by Attorney General Meese which looked into the NSC staff in late November, 1987. As the Iran-Contra Committees found, this so-called inquiry had the effects that by their questioning, the NSC staff was forewarned to shred their records and fix upon an agreed false story, and by the Meese Team's methods was foreclosed the last vital opportunity to uncover the obscured aspects of the scandal. The Congressional investigation uncovered extensive documentary evidence regarding incompetence, at best, by the Attorney General's inquiry team during the Meese Inquiry. The Congressional report summed up such matters as the Attorney General's taking no notes and remembering no details of his crucial interviews of CIA Director Casey and others, the Justice Department inquiry's not taking any steps to secure the remaining unshredded documents, and the Justice Department team's even allowing the shredding to occur while the team was in the room; the inquiry team excluded the Criminal Division and the FBI from the case until it was too late, and then the Attorney General gave his famous press conference of November 25, 1986, with an account that in key respects misstated and concealed embarrassing information which had

been furnished to him.[3] Had the Iran-Contra committees accepted the pendency of litigation as an excuse for not probing, the "Meese Inquiry" would have gone virtually unquestioned.

Soon thereafter Attorney General Meese resigned and was replaced by Attorney General Thornburgh.

II. IN LIGHT OF CONGRESS'S BROAD POWER OF INVESTIGATION, THE ASSERTED REASONS PUT FORTH BY THE ATTORNEY GENERAL ARE WITHOUT MERIT

It is thus apparent that time and again, Attorneys General have put the excuse of pending proceedings as a basis for avoiding legitimate Congressional oversight; that the Supreme Court has confirmed the validity of such oversight; that Congress has time and again insisted, successfully, on obtaining the internal records of the Department despite such claims by Attorneys General; that when Congress has done so, it has been vindicated by the discovery of waste, fraud, abuse, and criminality; and that often Attorneys General have been convicted, or required to resign, after the crumbling of such claims for withholding records.

We turn now to our review of the particular doctrines put forward by the Attorney General as they bear on these documents. Above all, the Attorney General's claim turns on the asserted principle that the mere pendency of a civil case allows the

---

[3] Report of the Congressional Committees Investigating the Iran-Contra Affair, H.R. Rep. No. 433 & S. Rep. No. 216, 100th Cong., 1st Sess. 310 (no notes), 313 (no securing documents), 314 (excluding Criminal Division), and 317-18 (press conference) (1987). Attorney General Meese's role was further analyzed in the additional views of four House committee chairmen, id. at 643-47. "Although the Attorney General testified in deposition at some length, he responded that he did not know, could not remember, did not recall, had no recollection, or some similar formulation some 340 times." Id. at 647.

blocking of oversight, apparently based on a "waiver" theory that if documents were not withheld from Congress, the Justice Department would relinquish its privileges vis-a-vis the civil litigants. As noted, Attorney General Thornburgh describes his "obligation" as being "to protect documents compiled by attorneys in connection with pending litigation, which are not in the public domain."

This position is without merit, on a number of bases. As discussed above, the Supreme Court, in Sinclair v. United States, 279 U.S. 263 (1929), addressed the case of a witness who refused to provide evidence on the ground that a lawsuit was pending. Id. at 290. The Supreme Court upheld the witness's conviction for contempt of Congress. The Court considered and rejected in strong terms the witness's contention that the pendency of lawsuits gave an excuse for withholding. Neither the laws directing that such lawsuits be instituted, nor the lawsuits themselves, "operated to divest the Senate, or the committee, of power further to investigate the actual administration of the land laws." Id. at 295. The Court held: "It may be conceded that Congress is without authority to compel disclosures for the purpose of aiding the prosecution of pending suits; but the authority of that body, directly or through its committees, to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits." Id. (emphasis added).

In an important decision, the D.C. Circuit specifically considered, and rejected, the argument that Congress's obtaining

documents somehow constituted a "waiver" of privileges regarding these documents. The case of Murphy v. Department of the Army, 613 F.2d 1151, 1155 (D.C. Cir. 1979), discussed with respect to the "doctrine[] of waiver" that "it is evident that the disclosure to the Congress[] could not have had that consequence." Congress has long "carve[d] out for itself a special right of access to privileged information not shared by others." Id. at 1155-56. If "every disclosure to Congress would be tantamount to a waiver of all privileges and exemptions, executive agencies would inevitably become more cautious in furnishing sensitive information to the legislative branch -- a development at odds with public policy which encourages broad congressional access to governmental information." Id. at 1156.

What the D.C. Circuit warned against, Attorney General Thornburgh now seeks to bring about, except with the twist that even though the waiver argument was slain, the Attorney General would still use it as an excuse. Thus, the D.C. Circuit vindicated the "public policy which encourages broad congressional access to governmental information," by extirpating the waiver argument. Yet, nevertheless, this "executive agency" is trying to "become more cautious in furnishing" what it considers "sensitive information to the legislative branch." In sum, the Attorney General attempts to cloak himself in a "waiver" argument which has been rejected in the courts precisely to prevent him from so cloaking himself.

The Attorney General's claim must be considered against the background of the Committee's investigative power. Eastland v.

United States Servicemen's Fund, 421 U.S. 491 (1975) explains that "'(t)he scope of the power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.'" Id. at 504 n.15 (quoting Barenblatt v. United States, 360 U.S. 109, 111 (1959)). "The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes." Watkins v. United States, 354 U.S. 178, 187 (1957).

Congressional investigative power is at its peak, as in the Inslaw matter, when the subject is alleged waste, fraud or abuse within a government department, such as the Justice Department. The investigative power "comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste." Id. "[T]he first Congresses" held "inquiries dealing with suspected corruption or mismanagement of government officials." Id. at 192. In a series of Supreme Court cases, "(t)he Court recognized the danger to effective and honest conduct of the Government if the legislature's power to probe corruption in the executive branch were unduly hampered." Id. at 194-95. Accordingly, the Court recognizes "the power of the Congress to inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government." Id. at 200 n.33.

In this instance, the Attorney General compounds the weakness of his assertion by using as a cloak a civil case which is not even facing trial any more. As he acknowledges, the case is on appeal.

In his letter, Attorney General Thornburgh says, "We do not regard work product generated while the case is in one court to be less sensitive simply because the case is currently under consideration in another court."

This is a transparent device for minimizing the significance of the fact that the pre-trial proceedings in the federal court system are past.[4] When discovery is over, when a trial is over, the Attorney General has more than a situation where "the case is currently under consideration in another court." It is not merely "in another court"; it is past the stage of consideration in an evidence-hearing district or bankruptcy court, and the evidence-taking record has been closed. The elementary principle that records lose their sensitivity as a case passes out of evidence-gathering stages is known even in the context of grand jury transcripts, where, unlike for these records, there is a privilege relating to the criminal process codified in an express rule of criminal procedure. Even in that context, as a case moves from the preindictment to the postindictment stage, and the grand jury is no longer gathering evidence, the sensitivity of records diminishes and their availability increases. See, e.g., Douglas Oil Co. of

---

4 An argument that, apart from pendency in the federal courts, there are administrative proceedings would be wholly frivolous. Given the number, variety, and duration of administrative proceedings, an assertion that these are a basis for blocking oversight amounts virtually to an assertion that there should not be any oversight. For example, if contract dispute proceedings between the Pentagon and defense contractors were an excuse for withholding documents regarding defense procurement fraud, there would be virtually no oversight possible over defense waste and fraud. If the Attorney General seriously intends to take this position, he would have to do so explicitly.

California v. Petrol Stops Northwest, 441 U.S. 211, 219 n.10 (1979); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 234 (1940). A fortiori, in the mere civil context, when a case's discovery and trial phases are past, the Attorney General has little basis for withholding records on the plea that the appeal is still pending. One can hardly see an end, considering that it lies in the Justice Department's power to prolong appeals to en banc or higher tribunals even longer.

The Department of Justice raises three privilege doctrines in its attempt to withhold documents from this Committee's investigation into the INSLAW matter. The Department asserts that the documents are covered by the "work product" doctrine, the "deliberative process" doctrine and the attorney-client privilege.

First, it should be noted that each of these doctrines has arisen, and been applied by the courts, in the context of judicial proceedings. They have been developed by the courts in common law to be used in the judicial forum. These judge-made doctrines are to be sharply contrasted with constitutional privileges and immunities, such as the Fifth Amendment right against self-incrimination, which the Constitution makes applicable to both the courts and the legislature. The context of congressional oversight has its own history, as summarized above in the discussion of attempted Attorney General withholdings in the past.

Moreover, by their own terms, none of the doctrines asserted by the Department would justify withholding in this instance. As regards the qualified "work product" privilege, it has always been held that the privilege is overcome by a sufficient showing of

need. The Supreme Court indicated, in the very case in which it created the doctrine, that "[w]e do not mean to say that all [] materials obtained or prepared . . . with an eye toward litigation are necessarily free from discovery in all cases." Hickman v. Taylor, 329 U.S. 495, 511 (1947).

Thus, the courts have repeatedly held that the "work product" privilege is not absolute, but rather it is only a qualified protection against disclosure.[5] As one court has indicated, "its immunity retreats as necessity and good cause is shown for its production in a balance of competing interests." Kirkland v. Morton Salt Co., 46 F.R.D. 28, 30 (N.D. Ga 1968).[6]

In fact, because the "work product" doctrine is so readily overcome when production of the material is important to the discovery of needed information, some courts have refused to call the doctrine a privilege. For instance, in City of Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 483, 485 (E.D. Pa. 1962) cert. denied sub. nom, General Electric Company v. Kirkpatrick, 372 U.S. 943 (1963), the court stated that the "work product" principle "is not a privilege at all; it is merely a requirement that very good cause be shown if the disclosure is made in the course of a lawyer's preparation of a case."

---

[5] See, e.g., Central National Insurance Co. v. Medical ...ive Co. of Fort Wayne, Indiana, 107 F.R.D. 393, 395 (E.D. ...85): Chipanno v. Champion International Corp., 104 F.R.D. ...396 (D. Or. 1984); American Standard, Inc. v. Bendix Corp., ...R.D. 443, 446 (W.D. Mo. 1976).

[6] "Special protection" is afforded to particular work product ...ial that reveals the attorney's mental processes. Upjohn Co. ...ted States, 449 U.S. 383, 400-401 (1981).

Similarly, the "deliberative process" doctrine is also limited. "Neither the predecisional deliberative process privilege nor the work-product privilege is absolute, and each can be overcome if the party seeking discovery shows sufficient need for the otherwise privileged material." Resident Advisory Bd. v. Rizzo, 97 F.R.D. 749, 752 (E.D. Pa. 1983) (citations omitted). See also, Lundy v. Interfirst Corporation, 105 F.R.D. 499 (D.D.C. 1985).

In the context of governmental investigations the qualified "work product" and the "deliberative process" doctrines, therefore, must, and do, give way to the public interest in ferreting out fraud, waste and abuse. The courts have recognized that both doctrines -- "work product" and "deliberative process" -- "obstruct the search for truth and because their benefits are indirect and speculative, they must be strictly construed." Lundy, 105 F.R.D. at 504.

> [A] Court must therefore, assure that these privileges are not applied "in a manner which will impede the search for truth in circumstances where the policies underlying these privileges will not be served."

Resident Advisory Bd. v. Rizzo, 97 F.R.D. at 752 (E.D.Penn. 1983) (quoting In re Grand Jury Proceedings, 557 F. Supp. 1053, 1055 (E.D. Pa. 1983)).

Congressional investigations have long been likened to grand jury proceedings in their inquest-like function, and routinely, grand jury subpoenas calling for documents important to the

criminal investigation are upheld over attorney "work product" claims.[7] As explained in one such case:

> [I]n an independent grand jury proceeding . . . the work-product privilege is displaced by the grand jury's authority and need to accomplish its investigatorial duty. The powers and prerogatives of a grand jury to do its work must be protected vigorously and construed liberally.

In re Grand Jury Proceedings, 73 F.R.D. 647, 653 (M.D. Fla. 1977) (emphasis added) (citations omitted).

Obviously such is the case, and to an even greater degree, when the "work product" or the "deliberative process" doctrine is considered against the needs of a congressional investigation examining executive branch improprieties. Congressional oversight of the government's programs and activities is a constitutionally grounded function of the Congress and of critical national importance. In short, neither the "work product" nor the "deliberative process" doctrine will support the withholding of documents from this Committee in its performance of its constitutional responsibilities.

As to the small set of documents for which any legitimate attorney-client privilege claim could be made against a private party seeking documents,[8] the privilege is not apposite in this

---

7 See, e.g., In re Grand Jury Subpoena dated Nov. 9, 1979, 484 F. Supp. 1099 (S.D.N.Y. 1980); In re Grand Jury Subpoena dated Dec. 19, 1978, 81 F.R.D. 691 (S.D.N.Y. 1979); In re Grand Jury Investigation, 599 F.2d. 1224 (3rd Cir. 1979); In re Sept. 1975 Grand Jury Terms, 532 F.2d 734 (10th Cir. 1976).

8 Just as Parliament declined to accept attorney-client privilege, so Congress, whose powers in this regard were developed on the model of Parliament's, decides for itself when and whether to accept attorney-client privilege. See, e.g., Proceedings Against Ralph Bernstein and Joseph Bernstein, H.R. Rep. No. 462,

oversight investigation by this committee. It is axiomatic that within one continuing institution, such as a partnership, a corporation -- or the government -- officers and officials cannot assert attorney-client privilege against the institution itself, for the privilege belongs to the institution, not the individual. For example, the Supreme Court held in Commodity Futures Trading Commission v. Weintraub, 471 U.S. 343, 349 (1985), that "when control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well. . . . Displaced managers may not assert the privilege over the wishes of current managers. . . ." In investigation within an institution -- an internal corporate inquiry, or, within the federal government, a Congressional inquiry -- the authority to investigate belongs to the duly authorized investigative body, which is not constrained in the same manner as an outside entity. In the related context of shareholder suits, the courts have held:

> But where the corporation is in suit against its stockholders on charges of acting inimically to stockholder interests, protection of those interests as well as those of the corporation and of the public require that the availability of the [attorney-client] privilege be subject to the right

---

99th Cong., 2d Sess. (1986); 132 Cong. Rec. H 666-685 (daily ed. Feb. 27, 1986); Attorney-Client Privilege: Memoranda Opinions of the American Law Division, Library of Congress, Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce, 98th COng., 1st Sess. (Comm. Print June 1983). It is unnecessary to address this in detail, however, as the case law discussed above reflects that even in a judicial forum, just as corporate officers could not assert attorney-client privilege against their board of directors, so department officials cannot assert it against Congress.

> of the stockholders to show cause why it should not be invoked in the particular instance.

Garner v. Wolfinbarger, 430 F.2d 1093, 1103-04 (5th Cir. 1970).

Any opposing principle would allow federal officials to shield themselves, not just from Congressional scrutiny, but from inspector general and prosecutorial scrutiny, just as, in the corporate context, it would allow them to shield themselves from directorial and internal audit scrutiny. That simply could not be allowed. Federal attorneys do not work on a payroll provided by any Mr. Thornburgh; they are on the federal government's payroll, and their advice comes with the understanding that advice by the federal government, to the federal government, is subject to oversight of the federal government. What boards of directors and successor managements do in corporations, Congress does in the government.

United States General Accounting Office

GAO Testimony

For Release on Delivery Expected at 9:30 a.m. EDT December 5, 1990

Problems Persist In Justice's ADP Management and Operations

Statement of
Milton J. Socolar
Special Assistant to the Comptroller General

Before the Committee on the Judiciary
House of Representatives

Mr. Chairman and Members of the Judiciary Committee:

We are pleased to be here today to discuss the results of our recent review, undertaken at your request, of the Department of Justice's ADP (automated data processing) management and operations. You asked if Justice has adequately responded to our previous recommendations on ADP management and case management. You also asked (1) whether the Justice information resources management (IRM) office is structured in accordance with the Paperwork Reduction Act of 1980; (2) whether the IRM office has sufficient authority and resources to fulfill its responsibilities under both the Brooks Act and the Paperwork Reduction Act; and (3) whether Justice has sufficient resources to properly conduct large-scale ADP and telecommunications acquisitions.

Our review disclosed that some longstanding problems still exist. It is difficult to understand the department's lack of progress in responding to our 1983 recommendation to develop accurate and complete information on its litigative cases; an effort that affects only the department's case management systems. However, of broader concern are the more fundamental problems with Justice's overall management of its information resources -- problems that can affect all of the department's systems.

In this regard, Justice has not yet implemented our 1986 recommendation to develop an information resources management plan. Organization problems also weaken management of information resources. Although its central IRM office is structured in accordance with the Paperwork Reduction Act of 1980, the senior IRM official does not have clear authority to direct the component agencies to accomplish Justice-wide ADP goals and objectives. In addition, Justice does not believe it has sufficient staff with adequate technical and managerial capabilities, at both the department and component levels, to conduct large-scale ADP acquisitions and required oversight.

These kinds of problems raise doubts as to Justice's ability to effectively manage its information technology resources, especially since Justice plans to spend over $2.7 billion for information technology and services in fiscal years 1991 through 1995. In this regard, two of the biggest spenders of this money--the INS (Immigration and Naturalization Service), and the FBI (Federal Bureau of Investigation)--account for over 55 percent of this amount, and seem to have the biggest problems. For example, our recent reports on the department's ADP security program[1] and INS' information management[2] showed that the department risks

---

[1] Justice Automation: Tighter Computer Security Needed (GAO/IMTEC-90-69, Jul. 30, 1990).

[2] Information Management: Immigration and Naturalization Service Lacks Ready Access to Essential Data (GAO/IMTEC-90-75, Sept. 27, 1990).

disclosing sensitive computer data because of poor security while INS risks admitting illegal aliens and granting benefits to ineligible aliens, and has millions of dollars in uncollected debts because of unreliable ADP systems. Also, a recent report by the department's Office of the Inspector General[3] pointed out that the FBI had "major internal control weaknesses" involving almost all aspects of its ADP operations, including findings that the FBI's IRM program is fragmented and ineffective.

Mr. Chairman, I would like to briefly summarize the results of our work and have our full report placed in the record of this hearing.[4]

JUSTICE HAS NOT ADEQUATELY RESPONDED TO PAST GAO RECOMMENDATIONS

Since 1979 we have issued a number of reports addressing Justice's ADP management and operations. These reports made recommendations to improve the department's ability to provide complete and reliable litigative caseload information and to develop and implement an IRM plan. Justice has not fully responded to these recommendations.

---

[3]Audit Report: The Federal Bureau of Investigation's Automatic Data Processing General Controls, September, 1990.

[4]Information Resources: Problems Persist in Justice's ADP Management and Operations (GAO/IMTEC-91-4, Nov. 6, 1990).

Litigative Caseload Information
Still Unreliable and Incomplete

After a number of false starts and over a decade of effort, Justice still does not have a system that can accurately provide the total number of cases being litigated and the total number of staff in the litigating organizations working on them.[5] Efforts to develop such a system have been unsuccessful because each litigating organization was allowed to develop a separate system to satisfy its own management needs and because data submissions from the litigating organizations that fed the departmental system were incomplete and unreliable.

Over 11 years ago we reported that the Congress and the Office of Management and Budget (OMB) found it difficult to evaluate Justice requests for additional resources because of a lack of information on its litigative caseloads.[6]

In 1983 we reported that the case management system with its incomplete and inaccurate information did not meet the needs of either Justice or the Congress.[7] At that time we recommended that

---

[5]Justice's litigating organizations include six divisions--Antitrust, Civil, Civil Rights, Criminal, Lands and Natural Resources, and Tax--and the Executive Office for U.S. Attorneys.

[6]Department of Justice Making Efforts to Improve Litigative Management Information Systems (GAO/GGD-79-80, Sept. 4, 1979).

[7]Department of Justice Case Management Information System Does Not Meet Departmental or Congressional Needs (GAO/GGD-83-50, Mar. 25, 1983).

the Attorney General develop a rigorous data-management program to achieve uniform, accurate, complete case-management information.

Three years later, in 1986, we again reported that despite actions to improve data quality, Justice still needed to address fundamental data-integrity problems.[8]

At present, although Justice has rectified some of its data problems, significant problems remain. According to its senior IRM official, no one within Justice uses the departmentwide case-management system because of its continuing inaccuracy. The main problem with the current system is the lack of a uniform case-numbering system among the litigating divisions and U.S. Attorney offices resulting in multiple counting of cases that are shared or transferred among these litigating organizations. It is not clear why the department would find it extraordinarily difficult to correct this problem.

In August 1990 Justice entered into an agreement with the General Services Administration's Federal Systems Integration and Management Center to perform a consolidated requirements analysis, and is exploring the feasibility of a single case-management system.

---

[8] Justice Department: Improved Management Processes Would Enhance Justice's Operations (GAO/GGD-86-12, Mar. 14, 1986).

IRM Plan Still Lacking

In our 1986 report we also recommended that the Attorney General develop a plan for managing the department's information resources.[9] We reported that Justice needed a plan to assess whether its component ADP initiatives were supporting departmentwide mission goals and objectives. In response, Justice developed a strategic automated information systems plan. Although the plan identifies cross-cutting information technology issues, the plan is not clear on how Justice will use information resources to accomplish its mission. Justice expects to develop an overall IRM plan by July 1991.

SENIOR IRM OFFICIAL DOES NOT HAVE CLEAR AUTHORITY

Under the Paperwork Reduction Act of 1980, federal agencies are assigned various information management responsibilities, such as implementing governmentwide and agency policies, principles, and standards. By departmental order, the information management requirements of the act have been assigned to the Justice Department's senior IRM official, the Assistant Attorney General for Administration.[10] Department regulations also give this official broad responsibilities that include IRM functions such as

[9]GAO/GGD-86-12, Mar. 14, 1986.

[10]Department of Justice Order 2880.1, "Information Resources Management Program," June 26, 1987.

formulating department policies, standards, and procedures for information systems.[11] Although the senior IRM official has these broad responsibilities, Justice's departmental orders and regulations do not give the senior official clear authority to direct component organizations to implement departmental IRM decisions. This lack of clear authority may have impeded the senior IRM official from fully carrying out his assigned responsibilities. In our judgement clear authority is important because of the varying degrees of independence of Justice's component organizations. For example, while we are not certain that this lack of clear authority prevented the senior IRM official from developing and implementing a uniform case numbering system, we noted that the manager of this project expressed such concern and the senior official recently asked the Attorney General for help in gaining the cooperation of the litigating components in developing such a system.

JUSTICE BELIEVES ITS IRM RESOURCES AND TECHNICAL AND MANAGEMENT CAPABILITIES ARE LIMITED

Justice believes that it does not have sufficient technical and managerial capabilities to administer its large ADP budget including the monitoring of information technology contracts, conducting large-scale ADP acquisitions, and providing the necessary management oversight of its information resources. The

[11] 28 C.F.R. 0.75.

senior IRM officials at both Justice and the Immigration and Naturalization Service have expressed this concern. And the issue has been raised in department reports.

The department's central IRM office says that limited resources have prevented it from fulfilling its oversight responsibilities. For example, staff shortages have precluded independent oversight and evaluation of IRM functions such as computer security including proper training of staff.[12] The result has been the proliferation of many disturbing security weaknesses in the department's sensitive computer systems.

\- - - -

In summary, Mr. Chairman, Justice must take decisive action to solve its longstanding information management problems. This need is made more urgent by department plans to acquire $2.7 billion in hardware, software, and computer services in the next 5 years. Our report contains recommendations for addressing these problems. In particular, we recommend that the Attorney General (1) require that the department develop an IRM plan and clean up its case-management systems to provide uniform, accurate, and complete information; (2) clarify the senior IRM official's authority in implementing departmental IRM decisions; and (3) augment, where needed, central IRM office capabilities.

---

[12]GAO/IMTEC-90-69, July 30, 1990.

Mr. Chairman, this concludes my prepared statement. I will be happy to respond to any questions at this time.

GAO

United States
General Accounting Office
Washington, D.C. 20548

Information Management and
Technology Division

B-238836

November 6, 1990

The Honorable Jack Brooks
Chairman, Committee on the
Judiciary
House of Representatives

Dear Mr. Chairman:

In response to your January 26, 1990, request, this report discusses the Department of Justice's automated data processing (ADP) management and operations. Specifically, you asked us if Justice has adequately responded to our previous recommendations on ADP management and case management. You also asked for an assessment of Justice's technical and management capabilities in the ADP area including whether (1) Justice's central ADP management office has sufficient authority and resources to fulfill its responsibilities under two public laws, P.L. 89-306 and P.L. 96-511;[1] (2) Justice's central information resources management (IRM) office is structured in accordance with P.L. 96-511; and (3) Justice has sufficient resources to properly conduct large-scale ADP and telecommunications acquisitions. Additional information on our objectives, scope, and methodology is contained in appendix I.

Results in Brief

Justice has not adequately responded to our past recommendation to develop uniform, accurate, and complete case management information. Of broader concern, however, are management problems that can affect the overall management of Justice's information technology resources. In this regard, Justice has not adequately responded to our past recommendation to develop an IRM plan. Although Justice's central IRM office is structured in accordance with the Paperwork Reduction Act, the senior IRM official does not have clear authority to require component organizations to implement Departmental IRM decisions. Moreover, Justice believes it has neither sufficient staff to conduct large-scale ADP acquisitions nor the overall technical and managerial capabilities to ensure that it is spending its IRM funds in the most efficient and effective manner. Justice's inability to develop a case management system and an IRM plan, the lack of clearly defined authority of the senior IRM official to carry out his responsibilities, and the questionable level of technical and

[1] P.L. 89-306 is commonly referred to as the Brooks Act, and P.L. 96-511 as the Paperwork Reduction Act of 1980.

managerial resources raise serious doubts as to Justice's ability to effectively manage its information technology resources.

Justice must take decisive steps to strengthen the management of its information technology resources. This report contains recommendations to the Attorney General to ensure that (1) our past recommendations are successfully addressed, (2) the senior IRM official has clear authority to implement Justice-wide information resources management decisions, and (3) Justice evaluates its central IRM office resource needs regarding technical and management capabilities, ADP contract management, and oversight, and augment them if they are inadequate.

Background

Justice has spent approximately $2.5 billion for information technology since fiscal year 1985. For fiscal year 1990, Justice's information technology budget is almost $579 million. Justice has estimated obligations of over $621 million for fiscal year 1991 for ADP and telecommunications technology. This amount represents approximately 10 percent of its total fiscal year 1991 budget request.

The Assistant Attorney General for Administration is in charge of the Justice Management Division, and is Justice's designated senior IRM official. The management division is assigned the responsibility of developing and administering IRM policy. These responsibilities include annually reviewing plans submitted by Justice organizations in conjunction with Justice's budget process, and overseeing the use and performance of information systems in accordance with Justice objectives, plans, policies, and procedures. The management division also reviews and approves the acquisition of ADP systems.

Justice Has Not Adequately Responded to Past GAO Recommendations

Since 1979 we have issued a number of reports addressing Justice's ADP management and operations. Two of these reports contained recommendations to the Attorney General to (1) improve Justice's ability to provide complete and reliable litigative caseload information, and (2) develop and implement an IRM plan. Justice has not fully responded to these recommendations. Therefore, most of the problems which prompted these recommendations continue today.

Justice's Litigative Caseload Information Still Unreliable and Incomplete

After a number of false starts and over a decade of effort, Justice still does not have a system that can accurately provide the total number of cases being litigated and the total number of staff in the litigating organizations working on them.[2] Efforts to develop such a system have been unsuccessful because (1) each litigating organization was allowed to develop a separate system to satisfy its own management needs, and (2) data submissions from the litigating organizations that fed the departmental system were incomplete and unreliable.

Since 1977, Justice has attempted to implement a departmentwide litigative case management system that would provide the Congress and the Office of Management and Budget (OMB) with summary information on its litigative caseload. The system was also to provide top Justice executives with work load information to make resource allocation and budgetary decisions. In 1979, we pointed out that the Congress and OMB had severe difficulties evaluating Justice's requests for additional resources because Justice lacked information on litigative caseloads.[3] We also reported that as a result, the Congress was requiring Justice to develop a comprehensive plan for managing its litigative caseloads. In response to the Congress, Justice developed a plan in April 1980 to implement a case management system. This system became operational in 1981.

In 1983, we reported that this system did not meet the information needs of either Justice or the Congress because it contained limited information on only a portion of Justice's overall work load, and that information was neither complete nor accurate.[4] Therefore, we recommended that the Attorney General develop a rigorous data management program to achieve uniform, accurate, and complete case management information. In response to our 1983 report, Justice assembled a group to develop a prototype, departmentwide case management system. This prototype was intended to extract common, case-related data from the case management systems of various divisions within Justice. By 1986 Justice had developed a prototype and was considering whether to implement it departmentwide.

[2] Justice's litigating organizations include six divisions—Antitrust, Civil, Civil Rights, Criminal, La[nd] and Natural Resources, Tax, and the Executive Office for U.S. Attorneys.

[3] Department of Justice Making Efforts to Improve Litigative Management Information Systems (GAO/GGD-79-80, Sept. 4, 1979).

[4] Department of Justice Case Management Information System Does Not Meet Departmental or Co[n]gressional Needs (GAO/GGD-83-50, Mar. 25, 1983).

Although our 1983 report pointed out that Justice needed to address fundamental data-integrity problems with its components' case management systems, Justice, without doing so, adopted the prototype as a departmentwide system. It became operational in 1986. Now, according to the senior IRM official, no one in Justice uses the system because of continuing data-integrity problems. According to the senior official, the main problem with the current system is the lack of a uniform case numbering system among the litigating divisions and U.S. Attorneys Offices. This problem results in multiple counting of cases, which are shared or transferred among the litigating divisions and U.S. Attorneys Offices. As a result, the departmentwide case management system cannot provide Justice, the Congress, or OMB with accurate caseload information.

In June 1989, Justice convened a new group to develop a uniform case numbering system and to discuss the possibility of having a standard case management system for all litigating organizations. However, the group met only once in 1989, and neither objective was fulfilled. The group's chairperson, who is also the project manager for the departmental case management system, stated that the senior IRM official could not dictate mission-related policy to the litigating organizations, and therefore could not dictate a uniform case numbering system. The same Justice official told us that to resolve the problems of case management, the senior IRM official would need the support of the Attorney General.

On May 21, 1990, we brought the lack of progress in developing a departmentwide case management system to the attention of Justice's senior IRM official. As a result, the senior IRM official wrote to the Attorney General on June 14, 1990, pointing out that Justice still does not have a system capable of providing accurate, aggregate caseload information. To solve this problem, the senior IRM official recommended to the Attorney General that Justice (1) conduct a consolidated requirements analysis of its case management information needs, and (2) explore the feasibility of developing a single case management system for all of its litigating organizations. The senior IRM official pointed out that these solutions will require cooperation from all of the litigating organizations and, therefore, asked the Attorney General for his support. The senior IRM official stated that he believes this effort will enable Justice to finally accomplish its goal of developing and implementing a single comprehensive case management system. On July 11, 1990, the Attorney General approved the senior IRM official's recommendations. On August 24, 1990, Justice entered into an agreement with the General Service Administration's Federal Systems Integration and Management Center to perform a consolidated requirements analysis, and is exploring

the feasibility of developing a single case management system by meeting with representatives of the litigating divisions.

IRM Plan Still Needed

In a 1986 report, we recommended that the Attorney General develop a plan for managing Justice's information resources.[5] In our view, without such a plan Justice could not adequately assess whether the ADP and telecommunications initiatives of its components helped them achieve departmental objectives. In response to our 1986 report, Justice developed a strategic, automated information systems plan. Justice first completed this plan in September 1986, and it was signed by the Attorney General in January 1987. Justice updated the plan in 1989.

Although the plan identifies information technology issues that cut across Justice, the plan is not clear on how Justice will use its information resources to accomplish its mission. As a result, it does not fully address how Justice will use information resources to accomplish departmental goals and objectives, as we recommended in 1986.

OMB Circular A-130 requires that agencies establish a planning process that meets program and mission needs. In addition, Justice's own methodology recommends that components identify their missions in their strategic plans, since all subsequent planning for Justice is built on components' missions.

Justice expects to develop an IRM plan, by July 1991, which will replace its current strategic plan.

Central IRM Office Structured in Accordance With the Paperwork Reduction Act

The Paperwork Reduction Act requires senior IRM officials to report directly to the agency head. The senior IRM official at Justice, however, reports to the Attorney General through the Deputy Attorney General rather than directly to the Attorney General. Although we are not aware of a specific delegation of this responsibility from the Attorney General to the Deputy Attorney General, by statute, the Attorney General has broad authority to delegate his functions to any other Justice official.[6] Furthermore, under federal regulations the Deputy Attorney General is authorized to exercise the Attorney General's responsibilities unless such responsibilities are required by law to be exercised personally by

[5] Justice Department: Improved Management Processes Would Enhance Justice's Operations (GAO/GGD-86-12, Mar. 14, 1986).

[6] 28 U.S.C. § 510.

the Attorney General.[7] Since the Paperwork Reduction Act does no[t] require the Attorney General to personally receive reports from the senior IRM official, we think this responsibility can properly be per[-] formed by the Deputy Attorney General. Therefore, in our view, Jus[-] tice's central IRM office is structured in accordance with the Paper[work] Reduction Act.

Senior IRM Official Does Not Have Clear Authority

Under the Paperwork Reduction Act, federal agencies are assigned various information management responsibilities. These responsi[bilities] include implementing applicable governmentwide and agency info[rma-] tion policies, principles, standards, and guidelines. By department[al] order, these functions have been assigned to the Justice Departme[nt's] senior IRM official, the Assistant Attorney General for Administra[tion.]

Under federal regulations, Justice's senior IRM official also has broa[d] responsibilities that include IRM functions such as (1) formulating department policies, standards, and procedures for information sy[stems] and (2) providing the final review and approval of systems, proced[ures,] and standards for the use of data elements and codes.[9]

Although the senior IRM official has been given these broad responsi[bili-] ties, neither Justice's departmental orders nor regulations give the senior official clear authority to direct component organizations to implement departmental IRM decisions. In this regard, we recommen[ded] in our 1986 report that the senior IRM official should clearly posses[s] authority to direct component actions to ensure successful depart- mentwide planning and implementation.[10] In response to this report, [Jus-] tice said that the senior IRM official has tacit and regulatory author[ity to] accomplish this task. Notwithstanding Justice's position on our 198[6] recommendation, we still believe that Justice needs to clarify the se[nior] IRM official's authority in implementing departmental IRM decisions.

This lack of clear authority may have impeded the senior IRM offici[al] from fully carrying out his assigned responsibilities. In our judgeme[nt,] clear authority is important because of the varying degrees of indep[en-] dence of Justice's component organizations. For example, while we a[re]

[7]28 C.F.R. § 0.15.

[8]Department of Justice Order 2880.1, "Information Resources Management Program," June 3[...]

[9]28 C.F.R. § 0.75.

[10]GAO/GGD-86-12, Mar. 14, 1986.

not certain that this lack of clear authority alone prevented the senior IRM official from developing and implementing a uniform case numbering system as discussed earlier in this report, we noted that he asked the Attorney General for "his assistance" in obtaining "cooperation" among all the litigating components in developing such a system. Also, as previously discussed, the manager of this project expressed concern over the authority of the senior IRM official to require the use of a uniform case numbering system.

Justice Believes Its IRM Resources, and Technical and Management Capabilities Are Limited

Justice believes it has neither sufficient staff to conduct large-scale ADP acquisitions nor the overall technical and managerial capabilities to ensure that it is spending its IRM funds in the most efficient and effective manner. As a result, Justice claims it cannot adequately monitor its ADP contracts and properly conduct its oversight responsibilities.

Justice Says Its Resources to Monitor Contracts Are Limited

Justice says it has limited resources at the department and component level to administer its growing ADP budget. From 1991 through 1995, Justice plans to spend about $2.7 billion on 83 initiatives involving ADP hardware, software, and related services (see app. II). The senior IRM official has expressed concern that Justice may face problems managing its initiatives because of its lack of staff. In the Justice Management Division's tactical plan for 1989-1991, for example, the senior IRM official noted that there is a limited number of Justice Management Division staff with the technical and project managerial talent to conduct large systems design, acquisition, and implementation for five projects with total cost estimates exceeding $29 million over that 3-year period.

Similarly, a report by the Justice Management Division's Systems Policy Staff issued in April 1989, identified an increased reliance on contractors by Justice components to meet ADP operational and mission requirements.[11] The report questioned whether Justice has adequate personnel to manage information technology contracts so they serve Justice's best

[11] Trends in Information Technology Expenditures for In-House Personnel and Commercial Services (1982-1988), Apr. 11, 1989.

interests. The senior IRM official expressed similar concerns in a February 15, 1990, memo to all Justice components, in which he stated Justice may face problems managing its information technology contracts effectively. In addition, the Associate Commissioner for the Immigration and Naturalization Service supported this point by saying that she did not have enough qualified personnel to manage contracts.

Justice's Central IRM Office Says It Has Limited Resources and Cannot Fulfill Its Oversight Responsibilities

Justice's central IRM office says limited resources have prevented it from fulfilling its oversight responsibilities. According to an April 1990 Justice planning document titled "Justification for Program and Performance," a major objective of the central IRM office is to "certify that Department components effectively and efficiently manage information resources." Although the central IRM office reviews information systems plans and acquisition lists from Justice component organizations, central IRM officials said staff shortages at that office have prohibited independent audit and evaluation of computer systems. For example, our July 1990 report on computer security pointed out that staff shortages resulted in the lack of oversight by the central IRM office, which contributed to many disturbing security weaknesses in Justice's sensitive computer systems.[12] Similarly, in our September 1990 report on information management at the Department's Immigration and Naturalization Service, we reported that the Service risks admitting illegal aliens and granting benefits to ineligible aliens, and has millions of dollars in uncollectible debts because of unreliable ADP systems.[13] According to Justice, limited resources prevented it from conducting comprehensive oversight of the Service's information management program.

In addition, in July 1988, the Justice Management Division's internal audit staff found that the oversight process conducted by Justice's central IRM office did not include post-implementation reviews.[14] Post-implementation reviews verify that information systems are operated in accordance with Justice policy, and are performing as expected. According to Justice officials, there are still not enough resources to conduct this oversight function.

[12] Justice Automation: Tighter Computer Security Needed (GAO/IMTEC-90-69, July 30, 1990).

[13] Information Management: Immigration and Naturalization Service Lacks Ready Access to Essential Data (GAO/IMTEC-90-75, Sept. 27, 1990).

[14] Audit Report on the Management of Department of Justice Microcomputer Policy, July 1988.

Conclusions and Recommendations

Because Justice (1) has not adequately responded to our past recommendations that were designed to improve its ADP management and operations, and (2) says it lacks sufficient staff with the technical and managerial capabilities to properly conduct large-scale ADP and telecommunications acquisitions, we believe it is highly unlikely that the Attorney General or Justice's senior IRM official can effectively and efficiently manage information resources at Justice.

To strengthen the management of information resources within the Department of Justice, we recommend that the Attorney General

- require that Justice's case management systems have uniform, accurate, and complete information on cases and require that Justice develop an IRM plan;
- clarify the senior IRM official's authority in implementing departmental IRM decisions; and
- augment, where needed, Justice's central IRM office capabilities in the technical and management areas, ADP contract management, and oversight.

We discussed the information contained in this report with Justice officials, and have incorporated their comments where appropriate. As requested by your office, we did not seek written agency comments.

As arranged with your office, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the date of this letter. At that time, we will send copies to the Attorney General, the House and Senate Appropriations Committees, and other interested parties. This report was prepared under the direction of Howard G. Rhile, Director, General Government Information Systems, who can be reached at (202) 275-3455. Other major contributors to this report are listed in appendix III.

Sincerely yours,

Ralph V. Carlone

Ralph V. Carlone
Assistant Comptroller General